

# **EXHIBIT 32**

## **Docket of Michelle Byrom**

06/28/2001 10:16 6014231667

CIRCUIT CLERK OFFICE

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## 1 General Docket, Circuit Court, Circuit Clerk

No. CR99-065

CFN 355

STATE OF MISSISSIPPI

VS.

COUNSEL FOR PLAINTIFF

Archibald Bullard

COUNSEL FOR DEFENDANT

Sunny C. Phillips + Terry Wood

MICHELLE BYROM  
CAPITAL MURDER

DATE

ORDERS, JUDGMENTS, ETC.

10/21/1999	Indictment Filed and Capias Issued
11/04/1999	Capias Returned Served by Bobby Flynt on 10/22/99
12/06/1999	Order Setting Arraignment signed by Judge Gardner on 12/3/99. 50/297
12/07/1999	Arraignment Order signed by Judge Gardner on 12/6/99. 50/314
12/07/1999	Affidavit of Indigence signed 12/6/99 by defendant and Judge Gardner. 50/315
12/07/1999	Petition to Appoint Counsel signed 12/6/99 by defendant and Judge Gardner.
12/07/1999	Order Appointing Attorney signed by Judge Gardner on 12/6/99. Attorneys appointed: Terry Wood & Sunny Phillips. 50/317
12/13/1999	Motion for Discovery submitted by Terry L. Wood.
12/14/1999	Discovery submitted by Ralph Dance, DA's Office.
12/29/1999	Order Setting Deadlines and Trial Dates signed by Judge Gardner on 12/28/99. 50/360. All motions by 3/17/00; all matters for hearing 4/6/00; trial set for 05/08/00 at Tishomingo Co. Courthouse, 9 a.m.
02/04/2000	Motion to Set Bond submitted by Terry L. Wood.
02/04/2000	Subpoena Duces Tecum issued to T. Wood for Dr. Ben Kitchens on 02/04/00.
02/04/2000	Subpoena Duces Tecum issued to T. Wood for Custodian of Records of Victorina Inn on 02/04/00.
02/04/2000	Subpoena Duces Tecum issued to T. Wood for Jane Morgan, Custodian of Medical Records of Iuka Hospital, on 02/04/00
02/10/2000	Subpoena Duces Tecum issued to T. Wood on Joel G. Byrom, Administrator of the Estate of Edward Byrom, Jr. on 02/04/00
02/10/2000	Subpoena Duces Tecum returned served by Renee Bullard on Dr. Ben Kitchens on 2/4/00.
02/10/2000	Subpoena Duces Tecum returned served by Renee Bullard on Linda Massa - Victoria Inn - on 2/7/00.
02/10/2000	Subpoena Duces Tecum returned served by Renee Bullard on Jane Morgan, Iuka Hospital, on 2/7/00.
02/10/2000	Subpoena Duces Tecum returned served by Renee Bullard on James E. Price, Jr., for Joel G. Byrom, on 2/7/00.
02/10/2000	Subpoena Duces Tecum issued to T. Wood for Gennie Estes, Holiday Inn, Express, on 2/10/00.
02/10/2000	Subpoena Duces Tecum issued to T. Wood for Joyce Price, Manager, Video Plex & Tanning on 2/10/00.
02/10/2000	Subpoena Duces Tecum issued to T. Wood for Todd Gurley, Manager, Movie Gallery, on 2/10/00.
02/10/2000	Subpoena Duces Tecum issued to T. Wood for Mansukh Patel, Manager, Village Inn, on 2/10/00.

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## 2 General Docket, Circuit Court, Circuit Clerk

No. CR99-065

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COUNSEL FOR DEFENDANT

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MICHELLE BYROM  
CAPITAL MURDER

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ORDERS, JUDGMENTS, ETC.

\*\* CONTINUED FROM PREVIOUS PAGE \*\*

02/10/2000 Subpoena Duces Tecum issued to T. Wood for Bob Sweeney, Bob's One Stop, on 2/10/00.

02/10/2000 Subpoena Duces Tecum issued to T. Wood for Ricky Marecle, Manager, Comfort Inn, on 2/10/00.

02/18/2000 Motion for Appointment of a Private Investigator submitted by T. Wood on 2/17/00.

02/23/2000 Motion submitted by Sunny Phillips on 2/22/00.

02/24/2000 Subpoena Duces Tecum returned served on 2/11/00 by Donna Knight on Gennie Estes.

02/24/2000 Subpoena Duces Tecum returned served on 2/11/00 by Donna Knight on Joyce Price.

02/24/2000 Subpoena Duces Tecum returned served on 2/11/00 by Donna Knight on Todd Gurley

02/24/2000 Subpoena Duces Tecum returned served on 2/11/00 by Donna Knight on Mansukh Patel

02/24/2000 Subpoena Duces Tecum returned served on 2/11/00 by Donna Knight on Bob Sweeney

02/24/2000 Subpoena Duces Tecum returned served on 2/18/00 by Donna Knight on Ricky Marecle

03/17/2000 Discovery submitted by Ralph Dance, DA's Office on 01/04/00, To Thomas Comer.

03/31/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office to Terry Wood on 3/27/00.

04/06/2000 Notice of Motions submitted by Sunny C. Phillips on 4/6/00.

04/06/2000 Motion submitted 4/5/00 by Sunny Phillips.

04/06/2000 Motion submitted 4/5/00 by Sunny Phillips.

04/06/2000 Motion submitted on 4/5/00 by Sunny Phillips.

04/06/2000 Motion submitted on 4/5/00 by Sunny Phillips.

04/07/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office to Terry Wood on 4/4/00.

04/07/2000 Motion to Pay Expense (Sir Speedy, 115 North Spring St., Tupelo, MS) submitted by Arch Bullard.

04/07/2000 Order to Pay Expense (Sir Speedy, 115 North Spring St., Tupelo) signed by Judge Barry Ford on 4/6/00.

04/13/2000 Motion for Continuance submitted by Terry Wood.

04/24/2000 Order signed by Judge Gardner on 4/13/00. 51/212

04/24/2000 Order for Funds to Hire An Investigator signed by Judge Gardner on 4/13/00 (\$1000.00) 51/213

06/19/2000 Order Setting Omnibus Hearing - Tishomingo County Courthouse on 6/22/00 at 1:30 p.m. Signed by Judge Gardner on 6/19/00 51/624 (copy)

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## 4 General Docket, Circuit Court, Circuit Clerk

CR99-065

CFN 355

THE OF MISSISSIPPI

VS.

COUNSEL FOR PLAINTIFF

Archibald Bullard

COUNSEL FOR DEFENDANT

Sunny C. Phillips &amp; Jerry Wood

HELLE BYROM

ITAL MURDER

TIAL MURDER

97-3-19(2)

DATE

ORDERS, JUDGMENTS, ETC.

\*\* CONTINUED FROM PREVIOUS PAGE \*\*

09/21/2000 Subpoena Duces Tecum returned served on 9/19/00 by Renee Bullard on Ann Bishop, Tishomingo County School Board of Education.

09/27/2000 Order of Continuance signed by Judge Gardner on 9/14/00

09/27/2000 Letter to District Attorney from Terry Wood dated 9/26/00.

09/28/2000 Letter to District Attorney from Terry Wood dated 9/27/00.

09/28/2000 Subpoena Duces Tecum issued to T. Wood for Dr. Ben Kitchens

09/29/2000 Subpoena Duces Tecum returned served on 9/29/00 by Renee Bullard on Dr. Ben Kitchens.

10/02/2000 Order to Draw Venire signed by Judge Gardner on 9/29/00. 52/324 (450 names to be drawn on 10/23/2000, 8:30 a.m.)

10/04/2000 Motion for Continuance or Appropriate Orders submitted by Terry Wood on 10/2/2000.

10/05/2000 Request to Subpoena Witnesses for 10/23/00 at 8:30 a.m. to give evidence in behalf of the State of Mississippi. (For list of 29 people see case file)

10/05/2000 Summons issued to 9 people for 10/23/00 at 8:30 a.m. on 10/5/00 on behalf of State. (For list of people, see case file).

10/05/2000 Criminal Subpoena issued on behalf of State of Mississippi to Casey Wayne Anglin.

10/05/2000 Criminal Subpoenas issued on behalf of State on 10/5/00 to 3 people. (For list, see case file)

10/06/2000 Letter to District Attorney from Terry L. Wood dated 10/5/00

10/11/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office to Sunny Phillips on 10/9/2000.

10/11/2000 Letter to District Attorney from Terry Wood dated 10/11/00

10/12/2000 Subpoena issued for Terry Wood on 13 people. (For list of people, see case file.)

10/12/2000 Subpoena Duces Tecum issued to T. Wood for Custodian of Records, Victorian Inn 10/12/00.

10/12/2000 Subpoenas issued for T. Wood on behalf of defendant to 8 people on 10/12/00. For list, see case file.

10/12/2000 Subpoenas issued for Sunny Phillips and Terry Wood on 10/12/00, 10/13/00, and 10/20/00. For list, see case file.

10/13/2000 Motion to Require State to Share Evidence submitted by Terry Wood by Sunny Phillips on 10/12/00.

10/13/2000 Order signed by Judge Gardner on 10/12/00. 52/345

10/13/2000 Order signed by Judge Gardner on 10/12/00. 52/346

10/13/2000 Defendant's Ex Parte Motion for Witness Costs submitted by Sunny Phillips on 10/12/2000 for \$1689.90.

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## 3 General Docket, Circuit Court, Circuit Clerk

CR99-065

CFN 355

TE OF MISSISSIPPI

VS.

COUNSEL FOR PLAINTIFF

Archibald Bullard

COUNSEL FOR DEFENDANT

Sunny C. Phillips &amp; Terry Wood

HELLE BYROM

ITAL MURDER

TIAL MURDER

97-3-19(2)

DATE

ORDERS, JUDGMENTS, ETC.

\*\* CONTINUED FROM PREVIOUS PAGE \*\*

06/20/2000 Order Setting Omnibus Hearing - Tishomingo County Courthouse  
6/22/2000, at 1:30 p.m. Signed by Judge Gardner 6/19/00  
51/625 (Original)

06/22/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office  
to Terry Wood on 6/22/00.

06/22/2000 Estimate by Court Reporter of Cost to Prepare Transcript for  
Appeal to Mississippi Supreme Court submitted by Melody  
Powell on 6/22/00.

06/22/2000 Transcript of Omnibus Hearing on 6/22/00 filed by  
Court Reporter, Melody Powell.

06/26/2000 Motion to Pay Expense (Map Sound & Video) submitted by  
Jim Pounds, DA's Office.

06/26/2000 Order to Pay Expense (Map Sound & Video) signed by Judge  
Frank A. Russell on 6/23/00.

06/30/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office  
to Terry Wood on 6/23/00.

06/30/2000 Scheduling Order signed by Judge Gardner on 6/30/00.  
51/656 -657

07/05/2000 Order signed by Judge Gardner on 6/29/00. 51/686 - 689

07/11/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office  
on 7/10/00 to Terry Wood.

07/28/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office  
to Terry Wood on 7/27/00.

08/09/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office  
to Terry Wood on 8/7/00.

08/11/2000 Motion for Continuance submitted by Sunny Phillips on  
8/10/00.

08/11/2000 Motion for Continuance of Hearing on Final Motions submitted  
by Sunny Phillips on 8/10/00

08/24/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office  
to Sunny Phillips on 8/22/00.

08/31/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office  
to Terry Wood.

09/01/2000 Order Authorizing Employment of Psychiatrist signed by  
Judge Gardner on 8/28/00.

09/15/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office  
to Sunny Phillips on 9/13/00.

09/19/2000 Subpoena Duces Tecum issued to T. Wood for Tishomingo County  
Board of Education on 9/19/00

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## 5 General Docket, Circuit Court, Circuit Clerk

CR99-065

CFN 355

STATE OF MISSISSIPPI

VS.

COUNSEL FOR PLAINTIFF  
Archibald BullardCOUNSEL FOR DEFENDANT  
Sunny C. Phillips & Terry WoodMICHELLE BYROM  
CAPITAL MURDER  
CAPITAL MURDER

97-3-19(2)

DATE

ORDERS, JUDGMENTS, ETC.

\*\* CONTINUED FROM PREVIOUS PAGE \*\*

10/13/2000 Order Allowing for Witness Costs signed by Judge Gardner on 10/12/00 (Amount allowed \$1689.90.) 52/347

10/13/2000 Defendant's Ex Parte Motion for Order Compelling Witness Attendance at Trial submitted by Sunny Phillips on 10/12/00.

10/13/2000 Order Compelling Witness Attendance at Trial signed by Judge Gardner on 10/12/00. 52/348.

10/13/2000 Summons returned served on all 9 people. (See case file for list)

10/13/2000 Subpoena Duces Tecum issued to T. Wood for Todd Gurley, Manager, Movie Gallery.

10/16/2000 Subpoena Duces Tecum returned served on 10/16/00 by Sunny Phillips on Todd Gurley,

10/16/2000 Defendant's Response to State's Motion in Limine to Exclude the Guilt Phase of the Trial Evidence of the Decedent, Edward Byrom, Sr.'s Abuse of the Defendant, Michelle Byrom submitted by Terry Wood.

10/16/2000 Response to State's Motion in Limine as to Edward Byrom, Sr.'s Pornographic Material submitted by Terry Wood.

10/17/2000 Subpoena returned served on 13 people. (For list see case file)

10/17/2000 Subpoena returned served on C. Anglin

10/17/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office to Sunny Phillips on 10/13/00.

10/17/2000 Letter to District Attorney from Terry Wood dated 10/16/00.

10/17/2000 Letter to Ralph Dance from Victorian Inn regarding reservations for jurors.

10/18/2000 Subpoena Duces Tecum returned served on 10/18/00 by Sunny Phillips on Victorian Inn Manager.

10/18/2000 Discovery submitted by Sunny Phillips to Arch Bullard on 10/17/00.

10/18/2000 Motion in Limine to Strike Letters of Defendant submitted by T. Wood on 10/17/00.

10/18/2000 Motion in Limine to Strike Hospital Statements of Defendant submitted by T. Wood on 10/17/00.

10/18/2000 Estimate by Court Reporter of Cost to Prepare Transcript for Appeal to Mississippi Supreme Court by Melody Powell on 10/18/00.

10/18/2000 Motion for Continuance submitted by Sunny Phillips on 10/18/00.

10/18/2000 Motion for Disclosure of Plea Agreement submitted by Sunny Phillips on 10/18/00.

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## 6 General Docket, Circuit Court, Circuit Clerk

J. CR99-065

CFN 355

STATE OF MISSISSIPPI  
VS.COUNSEL FOR PLAINTIFF  
Archibald Bullard  
COUNSEL FOR DEFENDANT  
Sunny C. Phillips & Terry WoodICHELLE BYROM  
CAPITAL MURDER  
CAPITAL MURDER

97-3-19(2)

DATE

ORDERS, JUDGMENTS, ETC.

\*\* CONTINUED FROM PREVIOUS PAGE \*\*

10/19/2000 Subpoenas issued on behalf of State of Mississippi (for list of people, see case file) at request of DA's Office on 10/18/00.

10/19/2000 Subpoenas issued by state (see case file for list) on 10/19/00.

10/23/2000 Subpoenas issued at request of State returned served.

10/23/2000 Subpoenas issued for T. Wood on behalf of defendant returned served. (For list of people, see case file.)

10/24/2000 Letter to DA's Office from Terry Wood dated 10/20/00.

10/24/2000 Letter to DA's Office from Terry Wood dated 10/23/00.

10/24/2000 Notice of Aggravating Circumstances submitted by Jim Pounds on 10/23/00.

10/24/2000 Notice of Intent to Offer Self-Authenticating Documents submitted by Arch Bullard on 10/23/00.

10/24/2000 Order Granting Defendant's Motion for Continuance - Trial is continued from 10/23/00 until 11/13/00 at 9 a.m. - Signed by Judge Gardner on 10/24/00. 52/375

10/25/2000 Order to Draw Venire signed by Judge Gardner on 10/24/00 - Clerk will draw 450 names on 10/25/00. 52/378

10/26/2000 Letter from Terry Wood to DA's Office dated 10/25/00.

10/31/2000 Subpoenas issued for State on 10/5/00 returned served. For list, see court file.

10/31/2000 Subpoenas issued for defendant on 10/12/00, 10/13/00, and 10/20/00 returned served. For list, see case file.

10/31/2000 Subpoenas issued on 10/19/00 for state returned served.

11/01/2000 Letter to Judge Thomas J. Gardner, III from Terry Wood dated 11/01/00.

11/01/2000 Amended Motion to Suppress and to Compel Discovery submitted by Terry Wood on 11/1/00 with exhibits.

11/02/2000 Order to Reduce Video Still signed by Judge Gardner on 10/30/00. 52/423

11/06/2000 Order Granting Motion to Release Mental Evaluation and Allowing Psychologists to Talk with the State signed by Judge Gardner on 11/2/00. 52/429 - 430

11/07/2000 Subpoena issued by State to Mary S. Till, Ben Kitchens, and Anna Southward for 9 a.m. on 11/8/00.

11/07/2000 Subpoenas issued for state on 11/7/00 returned served on 11/7/00.

11/07/2000 Defendant's Objection to State's Offer of Self Authenticating Documents submitted by Terry Wood on 11/7/00.

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## 7 General Docket, Circuit Court, Circuit Clerk

o. CR99-065

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STATE OF MISSISSIPPI

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Sunny C. Phillips + Terry Wood

ICHELLE BYROM  
CAPITAL MURDER  
CAPITAL MURDER

97-3-19(2)

DATE

ORDERS, JUDGMENTS, ETC.

\*\* CONTINUED FROM PREVIOUS PAGE \*\*

11/08/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office to Terry Wood on 11/3/00, 11/6/00, and 11/7/00.

11/08/2000 Subpoena Duces Tecum issued to T. Wood on 10/20/00. For list, see case file. Returned filed on 11/8/00.

11/08/2000 Notice of Mitigators to be Offered in Sentencing Phase submitted by Sunny Phillips on 11/8/00.

11/08/2000 Motion to Pay Expense submitted by Jim Pounds on 11/8/00 (To Reliagene Technologies, Inc in the amount of \$3500.00)

11/08/2000 Order to Pay expense signed by Judge Gardner on 11/8/00 to Reliagene Technologies, Inc. 52/432

11/08/2000 Motion to Pay Expense submitted by Jim Pounds on 11/8/00 for \$100.00 to AVS.

11/08/2000 Order to Pay Expense signed by Judge Gardner on 11/8/00 to AVS. 52/433

11/08/2000 Subpoenas issued to Terry Wood on 10/20/00. For list, see case file. Returned served on 11/8/00.

11/08/2000 Subpoenas issued for State on 10/19/00. For list, see case file. Returned served on 11/8/00.

11/09/2000 Subpoenas issued for state on 11/9/00. For list, see case file. Returned served on 11/9/00.

11/10/2000 Subpoenas issued to Terry Wood on 10/19/00. For list, see case file. Returned served on 11/10/00.

11/13/2000 Supplemental Discovery submitted by Ralph Dance, DA's Office to Sunny Phillips on 11/10/00.

11/14/2000 Motion in Limine and To Suppress submitted by Terry Wood on 11/14/00.

11/15/2000 Motion to Pay Expense submitted by Jim Pounds in amount of \$175.00 to Office Pro on 11/15/00.

11/15/2000 Order to Pay Expense signed by Judge Gardner on 11/15/00 to Office Pro in amount of \$175.00. 52/467

11/15/2000 Motion to Pay Expense submitted by Jim Pounds on 11/13/00 for \$50.00 to Office Pro.

11/15/2000 Order to Pay Expense signed by Judge Gardner on 11/15/00 to Office Pro for \$50.00. 52/468

11/16/2000 Jury Instructions filed

11/17/2000 Jury Instructions filed.

11/17/2000 Verdict: "We, the Jury, find the defendant, Michelle Byrom, guilty of Capital Murder."

11/17/2000 Letter to Judge Gardner from Thomas H. Comer dated 11/14/00

11/18/2000 Waiver of Sentencing Jury submitted by Arch Bullard, Assistant DA, submitted on 11/18/00.

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## 8 General Docket, Circuit Court, Circuit Clerk

D. CR99-065

CFN 355

STATE OF MISSISSIPPI

VS.

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Sunny C. Phillips + Terry Wood

MICHELLE BYROM  
CAPITAL MURDER  
CAPITAL MURDER

97-3-19(2)

DATE

ORDERS, JUDGMENTS, ETC.

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11/18/2000 Certificate of Counsel submitted by Terry Wood and Sunny Phillips, Counsel for Defendant, on 11/18/00.

11/18/2000 Petition for Sentencing Without a Jury submitted by Michelle Byrom, Terry Wood, and Sunny Phillips on 11/18/00.

11/18/2000 List of exhibits and exhibits received by Circuit Clerk from Court Reporter, Melody Powell, on 11/18/00

11/18/2000 Estimate by Court Reporter of Cost to Prepare Transcript for Appeal to MS Supreme Court (Melody Powell) submitted on 11/18/00.

11/18/2000 Certificate of Mileage submitted by Melody Powell, Court Reporter, on 11/18/00. Signed by Judge Gardner on 11/18/00. 52/474.

11/18/2000 Motion to Pay Expense submitted by Jim Pounds on 11/18/00 for \$2250.00 to W. Criss Lott, Ph.D.

11/18/2000 Order to Pay Expense signed by Judge Gardner on 11/18/00 for Dr. Criss Lott.

11/18/2000 Judgment signed by Judge Gardner on 11/18/00. Found Guilty of Capital Murder by Jury. Defendant remanded to custody of Tishomingo County Sheriff to await the sentencing phase of trial. 52/476 -477

11/18/2000 Sentencing Order signed by Judge Gardner on 11/18/00.

11/18/2000 Notice of Criminal Disposition

11/27/2000 Subpoenas issued for Terry Wood for 11/13/00 at 9 a.m. For list of people, see case file. Returned on 11/27/00.

11/27/2000 Subpoenas issued for State on 10/19/00. For list of people, see case file. Returned on 11/27/00.

11/27/2000 Subpoenas issued for state on 11/10/00. For list, see case file. Returned on 11/27/00

11/27/2000 Motion for Judgment of Acquittal Notwithstanding the Verdict of the Jury and for New Trial submitted by Terry Wood on 11/27/00.

12/19/2000 Motion to Pay Expense submitted by Arch Bullard on 12/15/00 for \$1135.80 to Steven Hayne, M. D.

12/19/2000 Order to Pay Expense signed by Judge Gardner on 12/15/2000 for Dr. Steven Hayne. 52/547

01/08/2001 Subpoenas issued to Terry Wood for 11/13/00 at 9 a.m. on 10/20/00. Returned on 01/08/2001.

01/08/2001 Subpoenas issued for state on 10/19/00 for 11/13/00 at 8:30 a.m. For list, see case file. Returned on 01/08/2001.

01/23/2001 Motion for Approval for Expenses for Psychiatrist, Dr. Keith Caruso submitted by Terry Wood on 01/23/01.

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## 9 General Docket, Circuit Court, Circuit Clerk

D. CR99-065

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CAPITAL MURDER  
CAPITAL MURDER

97-3-19(2)

DATE

ORDERS, JUDGMENTS, ETC.

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01/24/2001 Petition for Approval of Attorney's Fees for Representation of Indigent Defendant submitted by Terry Wood on 01/23/01.

02/01/2001 Order Allowing Attorney Fee For Counsel Appointed to Represent Indigent Defendant signed by Judge Gardner on 01/31/2000 for \$18,123.68. 53/46

02/05/2001 Order Allowing Substitution of Copies for Exhibits signed by Judge Gardner on 01/31/01. 53/51

02/08/2001 Order Denying Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict of the Jury and For New Trial signed by Judge Gardner on 02/07/01. 53/60

02/08/2001 Motion to Pay Expense submitted by Jim Pounds on 02-05-01 for Mary Margaret Ferguson, Official Circuit Court, Reporter for \$415.00.

02/08/2001 Order to Pay Expense signed by Richard D. Bowen on 2/5/01 for Mary M. Ferguson. 53/59

02/09/2001 Motion to Pay Expense submitted by Arch Bullard on 2/9/01 for Melody Powell, Official Court Reporter, for \$1005.00.

02/12/2001 Order to Pay Expense signed by Richard D. Bowen on 2/9/01 for Melody Powell. 53/97

02/15/2001 Subpoenas issued for defendant to Sunny Phillips and Terry Wood on 10/20/00. For list, see case file. Returned on 2/15/01.

02/15/2001 Acknowledge receipts of allowances for hotel, meals, and travel for week of trial, November 13 - 18, 2000. For list, see case file.

03/21/2001 Motion to Re-Open Time for Appeal submitted by Terry Wood on 03/20/01 with Exhibits.

03/22/2001 Order Approving Payment for Psychiatrist Services signed by Judge Gardner on 3/21/01 to Dr. Keith Caruso. 53/228

03/22/2001 Order Re-Opening Time for Appeal signed by Judge Gardner on 3/21/01. 53/229

03/22/2001 Notice of Appeal submitted by Terry Wood on 3/22/01.

03/26/2001 Notice of Appeal, letter, docket fee, and other papers mailed to Supreme Court Clerk.

03/26/2001 Letter and certified copy of Notice of Appeal to all attorneys of record, Judge Gardner, and Court Reporters, M. Powell and Mary M. Ferguson.

03/27/2001 Clerk's Estimate for Cost of Appeal

04/04/2001 Designation of the Record submitted by Terry Wood on 4/3/01.

04/16/2001 Letter from Supreme Court Clerk dated 4/10/01 to Terry L. Wood, Attorney for defendant.

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## General Docket, Circuit Court, Circuit Clerk

-065

CFN 355

MISSISSIPPI

VS.

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Sunny C. Phillips + Terry Wood

BYROM

MURDER

MURDER

97-3-19(2)

DATE

ORDERS, JUDGMENTS, ETC.

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'20/2001 Court Reporter's Acknowledgment submitted by Melody Powell on 4/14/01.

'23/2001 Motion for Leave to Appeal in Forma Pauperis submitted by Sunny Phillips on 4/23/01.

'23/2001 Affidavit to Accompany Motion for leave to Appeal in Forma Pauperis signed by defendant on 4/12/01.

'24/2001 Court Reporter's Acknowledgement submitted by Mary M. Ferguson on 4/23/01.

'15/2001 Order for Leave to Appeal in Forma Pauperis signed by Judge Gardner on 5/8/01. 53/553

'18/2001 Invoice for cost of appeal from Court Report Mary Margaret Ferguson dated 5/18/01.

'18/2001 Invoice for cost of appeal from Court Reporter Melody Powell dated 5/18/01.

'18/2001 Notice of Completion of Appeal from Court Reporter.

'31/2001 Motion to Pay Expenses

'31/2001 Order to Pay Expenses  
53 578

'31/2001 Itemized Statement for Compensation & Expenses of Court-Appointed Counsel  
53/579-580

'12/2001 Circuit Clerk's Notice of Completion of Appeal to Attorneys and Supreme Court.

12/2001 Clerk's Cost Bill

12/2001 Clerk's Final Cost of Appeal.

12/2001 Clerk's Certificate.

# **EXHIBIT 33**

## **Mark McDonald Authentication of Records**



**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

*Mississippi Supreme Court Case No. 2007-DR-01758-SCT  
Itawamba County Case No. 03-090(G)1*

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*THOMAS EDWIN LODEN, Petitioner*

v.

*STATE OF MISSISSIPPI, Respondent*

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**AUTHENTICATION OF TRIAL COUNSEL'S RECORDS**

I, Mark R. McDonald, do declare as follows:

1. I am a member of the State Bar of California (Bar No. 137001) and a partner of the law firm of Morrison & Foerster, LLP, counsel of record for Petitioner Thomas Edwin Loden. I make this declaration on personal knowledge. If called as a witness herein, I could and would testify competently to the matters set forth below. I file this declaration in support of Mr. Loden's Petition for Post Conviction Relief.
2. In connection with the above matter, Loden's prior counsel sent me Loden's case files containing attorney work product, discovery materials, court documents and other records kept by Attorneys David Daniels and James Johnstone in the course of their representation of Loden.
3. These records include the Handwritten Notes of Attorneys Johnstone and Daniels, a fax from Katrina Loden dated 10/28/00, and the docket of Michelle Byrom attached hereto as Exhibits 25, 31 and 32 respectively.
4. These records also contained the investigation notes and a report of an interview of Katrina Loden conducted by Herb Wells attached hereto as Exhibit 26.

5. These records also contained the Report and Expense Report and Invoice of Dr. Gerald O'Brien attached hereto as Exhibit 29.
6. The records contained the discovery materials provided by the State to Attorneys Johnstone and Daniels, attached hereto as Exhibit 28.
7. The records contained letters written by Loden to his attorneys and Herb Wells, attached hereto as Exhibit 30.
8. In the course of conducting a mitigation investigation of this case, I have been provided with Criminal Background records for Bill Brown, Jr., Sonia Brown, Anita Ritchey, attached hereto as Exhibit 23.

FURTHER AFFIANT SAYETH NOT.

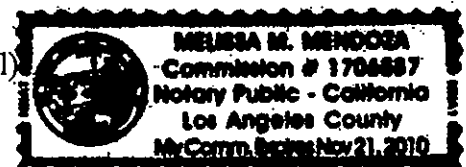
  
MARK R. MCDONALD

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES )

Subscribed and sworn to before me on this 5th day of December, 2008, by  
Mark R. McDonald, who proved to me on the basis of  
satisfactory evidence to be the person(s) who appeared before me.

Signature: Melissa M. Mendoza

(seal)



# **EXHIBIT 34**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

*Mississippi Supreme Court Case No. 2007-DR-01758-SCT  
Itawamba County Case No. 03-090(G)1*

---

*THOMAS EDWIN LODEN, Petitioner*

*v.*

*STATE OF MISSISSIPPI, Respondent*

---

**AFFIDAVIT OF HERB WELLS**

State of Mississippi  
Lee County

I, Herb Wells, do declare as follows:

1. I am a former police officer and have performed a number of investigations into issues of guilt or innocence in connection with criminal defense matters.
2. On or about March 7, 2001, I learned that the trial court had authorized funds for Thomas Loden's attorneys to retain an investigator and that attorney David Daniels wanted to hire me as an investigator.
3. The primary focus of my investigation was to gather facts and information related to Mr. Loden's crime. Pursuant to this task, I was to review the discovery provided to me by counsel and follow up on any requests made of me by attorney David Daniels.
4. Attached hereto is a true and correct copy of my investigation notes that show the time I incurred on this matter and the witnesses I interviewed in connection to Mr. Loden's case.

5. The above referenced investigation notes accurately set out the witnesses I interviewed in connection with this matter. I frequently discussed the location and identity of any potential witnesses with Attorney Daniels.
6. In the course of my investigation, Mr. Loden contacted me several times in writing, requesting that I provide him with certain discovery documents and copies of my investigation interview notes. I contacted attorney Daniels and informed him of Mr. Loden's requests. Mr. Loden was concerned about the lack of lack of security in Itawamba County Jail so, at his request, I did not personally provide Mr. Loden with my investigation notes or copies of any discovery material in my possession.
7. I was not aware that Attorneys Daniels and Johnstone had filed a motion for funds to hire a mitigation expert, or that the Circuit Court denied that motion. Daniels and Johnstone never asked me to conduct a "mitigation" investigation. I have never conducted a purely mitigation investigation, however, I obtained information in this case about Mr. Loden's family background, his childhood and youth, that he had been physically and sexually abused, the problems he had in his personal life and his military experiences. I discussed this information with Attorney Daniels.
8. The penalty phase of my investigation had not begun prior to Mr. Loden's plea and the penalty phase was not discussed at that stage with Attorney Daniels.
9. I served subpoenas on several witnesses in this matter on June 18, 2001 but I do not recall if this was in connection to trial or the suppression hearing in the case.
10. After the suppression motions were decided on or about June 27, 2001, I spoke to Attorney Daniels three additional times. I do not recall the content of our conversations.

11. On September 20, 2001, I received a call from Mr. Loden's mother who told me that she learned there was a hearing scheduled for the next day at which Mr. Loden would plead guilty. That is the first I have heard that Mr. Loden was considering pleading guilty.

FURTHER AFFIANT SAYETH NOT.

  
HERB WELLS

Subscribed and sworn to before me on this 3rd day of December, 2008,  
by Herb Wells, who proved to me on the basis of  
satisfactory evidence to be the person(s) who appeared before me.

Joyce R Loftin, Circuit Clerk, Lee Co, MS

Signature: by: Daula J. Moses, d.c. (seal)





ATTORNEY WORK PRODUCT  
PRIVILEGED AND CONFIDENTIAL

INVESTIGATION CASE REFERENCE

INVESTIGATOR Herb Wells OUR # 21049  
RE: State of Mississippi vs. Thomas Edwin Loden, Jr.  
Itawamba County Circuit Court No.: CR00-068

CONFIDENTIAL INVESTIGATION NOTES

**March 8, 2001 Thursday:**

04:30 PM Picked up copy of the order from Attorney David Daniels.

**March 28, 2001 Wednesday:**

02:30 PM Departed in route to the Highway Patrol station, New Albany, Mississippi. With Attorney James Johnston and David Daniels in New Albany and the Highway Patrol Investigator Rick Marr re: viewing Loden file. We then adjourned to Attorney James Johnston's office in Pontotoc re: trial preparation.

05:45 PM Secured. Miles 71.

**March 29, 2001 Thursday:**

07:00 AM Information investigation re: trial preparation re: Thomas E. Loden.

07:30 AM Trial preparation.

08:30 AM Secured.

09:35 AM Departed in route to meet with Attorney David Daniels.

12:45 PM Secured. Miles 18.

**April 4, 2001 Wednesday:**

09:00 AM Telephone call to Stella Renick at [REDACTED] set up meeting at this time. I then departed in route to meet with her. Met with Stella Renick.

01:30 PM Secured. Miles 62.

**April 9, 2001 Monday:**

09:00 AM Telephone call to Bobby Christian re: trial preparation.

11:15 AM By telephone with David Daniels, trial preparation seeking information on second wife. After talking with David I stopped in his office, met with Jeannie, picked up some documents requested and left off documents concerning my interview with Stella.

11:55 AM Left David Daniels office.

12:35 PM Received a call from Bobby Christian requesting we change the appointment to Friday in order for her to have an opportunity to get some more documents in.

---

**April 10, 2001 Tuesday:**

09:00 AM Trial preparation re: discovery evaluation.  
12:00 PM Secured.

---

**April 12, 2001 Thursday:**

10:00 AM Talked with Bobby Christian, [REDACTED] set up meeting for 1:00 p.m. on 04/13/2001.

---

**April 13, 2001 Friday:**

12:40 PM Departed in route to [REDACTED] re: Bobby Christian. Met with Bobby Christian, [REDACTED], Tupelo, MS 38801, telephone number [REDACTED]. Picked up information she had concerning Eddie in the Marines. Delivered them to Attorney David Daniels office.  
02:45 PM Secured. Miles 18.

---

**April 16, 2001 Monday:**

11:00 AM Telephone call to Attorney David Daniels office, not available at this time, left message for him to call me back.

---

**April 17, 2001 Tuesday:**

09:45 AM Returned a call to Bobby Christian, 662-844-3970. Advised she had received certain documents in concerning Eddie and requested I call her back in the morning and set up appointment.

---

**April 18, 2001 Wednesday:**

10:40 AM Met with David Daniels re: trial preparation. Requested subpoenas for venue, interview housekeepers and time table.  
11:50 AM Secured.

---

**April 19, 2001 Thursday:**

08:00 AM Met with Bobby Christian, picked up documents, also information on Joy Gibo. Delivered documents to Jeannie at David Daniels office.  
10:45 AM Secured.  
01:15 PM Departed in route to Attorney David Daniels office re: venue investigation. Met with Jeannie, talked with David by phone re: subpoenas. In route to Itawamba County Circuit Clerk's office. Subpoenas issued, Itawamba County.  
02:50 PM Served Sandra Newton, Itawamba County Times.  
03:25 PM Served Judy Campbell, Northeast Mississippi Daily Journal.  
03:50 PM Served Terry Abernathy, Channel 4, WCBI.

04:45 PM Served Terry Smith, WTVA Channel 9.  
05:00 PM Secured. Miles 72.

---

**April 20, 2001 Friday:**

09:00 AM Trial preparation re: time table.  
12:00 PM Secured.

---

01:30 PM Departed in route to Attorney David Daniels office. Met with Attorney David Daniels. Proceeded with Attorney David Daniels to Fulton, met with Thomas Loden.  
05:10 PM Secured. Miles 18.

---

**April 23, 2001 Monday:**

10:30 AM Departed in route to the Daily Journal re: subpoena. Picked up newspaper articles from the Daily Journal. Cost of copies \$5.00. Checked TV4, Terry Abernathy not in at this time. Picked up subpoenaed information from WTVA Channel 9.  
01:15 PM Secured. Miles 27.

---

**April 24, 2001 Tuesday:**

10:25 AM Received a call from Attorney David Daniels re: status of venue and medical authorization re: Rena Loden, advised of same. Departed in route to Rena Loden residence. Medical authorization release X'ed and witnessed by her daughter, and by myself. Served Melissa Shackelford at IMA, Custodian of Records for Dr. Flowers. Picked up subpoenaed information from Channel 4. Delivered all venue information along with a copy of the medical release to Attorney David Daniels. David not in at this time, left off information with Jeannie. Departed to copy video tapes. Met with Attorney David Daniels re: trial preparation.  
04:10 PM Secured. Miles 79.

---

**April 25, 2001 Wednesday:**

12:00 PM Departed in route to Itawamba County Circuit Clerk's office. Delivered return for subpoena duces tecum for Dr. Alan Flowers.  
01:45 PM Secured.

---

**April 26, 2001 Thursday:**

12:00 PM Picked up requested copies.

---

**April 30, 2001 Monday:**

12:30 PM Trial preparation re: time table.  
03:20 PM Called David Daniels office, not in, left message. Secured.

---

**May 1, 2001 Tuesday:**

01:00 PM Met with David Daniels.  
01:45 PM Secured.

---

**May 2, 2001 Wednesday:**

10:45 AM Left off the invoice for the WTVA Channel 9 tape with Jeannie at Attorney David Daniels office.

03:00 PM Departed in route to Joyce Brewer's residence. Information provided from Stella as Joyce Brewer's residence [REDACTED], Fulton, Itawamba County, Mississippi.

03:50 PM At [REDACTED].

05:00 PM Called Margaret Gassaway at [REDACTED], a lady answered the phone and identified herself as her daughter Marsha, advised that Margaret was at the doctor's office and did not know for sure what time she would be in this date. I told her that I would call back later.

05:05 PM Secured my interview with Joyce Brewer, tag number MM4 016 in drive. Advised that she is putting the house up for sale, going to be moving to Hamilton, Alabama, getting married to someone in Alabama.

06:00 PM Secured. Miles 71.

---

**May 3, 2001 Thursday:**

09:15 AM Telephone call to Margaret Gassaway, [REDACTED] advised she would meet with me at this time. Departed in route to her address, [REDACTED] Itawamba County. Written statement by Margaret Gassaway.

11:15 AM Gary and Lynn O'Neal, Pastor at Greenwood Baptist Church, no one home at this time. [REDACTED] 1st house on the left off of Dorsey.

11:45 AM Secured. Miles 47.

---

**May 4, 2001 Friday:**

08:30 AM Commenced trial preparation re: time table interview reports.

10:30 AM Secured.

---

**May 10, 2001 Thursday:**

02:15 PM Met with Attorney David Daniels at the Lee County Justice Center re: trial preparation.

---

**May 13, 2001 Sunday:**

08:30 AM Received a letter from Tom Loden.

---

**May 14, 2001 Monday:**

10:30 AM Called David Daniels re: this letter at [REDACTED].

David not in at this time, left message for him to return my call...

---

**May 15, 2001 Tuesday:**

08:50 AM Called Attorney David Daniels office, not in, left message on the answering machine.

11:45 AM Met with Attorneys Jim Johnston and David Daniels re: trial preparation. Set up meeting 2:00 p.m. this date with Attorney David Daniels.

01:45 PM Departed in route to Attorney David Daniels office re: trial preparation. Met with Attorney David Daniels re: trial preparation. Also David Daniels called Katrina Loden, [REDACTED], requested I call her Monday or Tuesday afternoon to go to Jackson and meet with her. Departed to Fulton to meet with Tom Loden. Met with Tom Loden, Itawamba County Jail.

05:50 PM Secured. Miles 59.

---

**May 16, 2001 Wednesday:**

09:20 AM At Attorney David Daniels office, David not in, left message for him to call me.

11:15 AM Received a call from David Daniels re: status and trial preparation. Requested I attempt to locate Joy.

---

**May 22, 2001 Tuesday:**

11:15 AM Met with Attorney David Daniels re: witness list. Requested I attempt to locate and interview the second wife.

03:35 PM Attorney David Daniels office. Met with Attorney David Daniels re: trial preparation. Received a subpoena for Katrina Loden.

04:50 PM Secured. Miles 18.

08:00 PM Information investigation on Joy Loden. \$95.00.

---

**May 24, 2001 Thursday:**

03:10 PM Telephone call to Katrina Loden, set up appointment May 30th at 2:00 p.m. her office. Called Attorney David Daniels office and advised Jeannie of meeting.

---

**May 25, 2001 Friday:**

11:20 AM Telephone call to Attorney David Daniels office re: scheduled trip for Jackson. Also advised of the requested additional funds.

---

**May 29, 2001 Tuesday:**

12:30 PM Met with Attorney David Daniels re: trial preparation, re: Katrina Loden and re: Tom Loden's request.

04:30 PM Received a call from Attorney David Daniels authorizing additional funds for investigation re: this matter.

---

**May 30, 2001 Wednesday:**

09:00 AM Departed in route to meet with Tom Loden, Itawamba County. Met with Tom Loden. Then to Jackson to meet with Katrina Loden.

02:00 PM Met with Kat Loden and Jim Craig. Also served subpoena and picked up copy of records for the Marines information. Copies \$58.00 paid by cash.

03:30 PM Secured meeting.

07:25 PM Secured. Miles 443.

---

**June 5, 2001 Tuesday:**

09:45 AM Met with Attorney David Daniels, delivered all correspondence, medical records and report.

11:00 AM Secured.

---

**June 15, 2001 Friday:**

03:45 PM Telephone call with Attorney David Daniels re: trial preparation and subpoenas.

---

**June 18, 2001 Monday:**

11:15 AM Attorney David Daniels office re: trial preparation and picked up subpoenas to be issued in Itawamba County. In Itawamba County Circuit Clerk's Office, Subpoenas issued for Kat Loden, Joyce Brewer, Margaret Gasaway, Gary O'Neal, Stella Renick, and Rena Loden. I then met with Tom Loden at the Itawamba County Sheriff's Department, delivered discovery requested from Attorney David Daniels office. All of the noted above were served personally except for Rena Loden, due to health, Stella Renick accepted on her behalf. Kat Loden lives in Jackson.

06:30 PM Arrived at my office, called Bobby Christian and Anita Ritchey re: trial preparation.

07:00 PM Secured. Miles 71.

---

**June 19, 2001 Tuesday:**

09:30 AM Attorney David Daniels, trial preparation meeting, requested cancel Kat's subpoena and to issue and serve subpoena to Anita Ritchey.

11:30 AM Secured. Miles 18.



---

**June 20, 2001 Wednesday:**

10:00 AM Departed in route to Attorney David Daniels office. With Attorney David Daniels, re: interviewing witnesses and also issuing and serving subpoena to Anita Richey. Also served Rena Loden personally.

---

**June 21, 2001 Thursday:**

11:25 AM Received a call from Attorney David Daniels' office advising to send subpoena to Katrina Loden. Check to process server Cynthia Longino \$50.00 for rush serve and sent Fed-Ex.

03:00 PM Called Margaret Gassaway, [REDACTED], requested she contact Stella and have her help with taking care of Ms. Loden while she testifies in the motions on the 26th. She was very cooperative and insinuated she would call Stella to work something out. I then departed in route to Fed-Ex re: sending subpoena to process server in Jackson. Fed-Ex to Ridgeland and back, \$36.00.

04:00 PM Secured. Miles 20.

---

**June 22, 2001 Friday:**

11:20 AM Telephone call to [REDACTED] spoke to Mr. Gassaway. Advised that Stella and Margaret had something worked out to where she could stay with Ms. Loden while Stella testified Tuesday morning for the hearing.

---

**June 25, 2001 Monday:**

10:30 AM Telephone call to David Daniels' office, re: motions for 06/26 hearing.

---

**June 26, 2001 Tuesday:**

10:00 AM Received process return from Katrina Loden process.

01:00 PM Delivered return to Attorney David Daniels' office.

---

**July 9, 2001 Monday:**

09:50 AM Received a call from Bobby Christian requesting I meet with her concerning some issues involving this matter.

11:00 AM Talked with Bobby Christian at her residence. Her granddaughter Charlie was home. Talked with her re: her concerns of legal representation. I suggest that with the legal area of concern she had that she contact her Attorney for assistance and she advised me she would contact Ed DePriest.


11:55 AM Secured.

03:10 PM Called Attorney David Daniels, not available at this time, left message.

---

July 28, 2001 Saturday:

02:00 PM Spoke by phone with David Daniels. This trial has been continued until October 8, 2001.



Herb Wells, CLI, LCI, MCI

*Certified Legal Investigator*

Herb Wells & Associates, Inc.

# **EXHIBIT 35-A**

Mr. Johnstone,

Thursday 2 Feb 2001

I just wanted to write a quick letter and tell you how much that I do appreciate you taking the time out of your schedule to come and to speak with me. I know or can imagine just how busy that you must be. Thank-you.

I hope that I'm not bothering you or asking too many questions, for I do not desire to burden you any more than you are already. It is just that I desire or need to know a few things to be better able to make a decision on a few things, including my up-coming divorce.

I've a lawyer, on stand-by only, for the divorce if needed. I do hope it will not cause any problems for me, with your services.

What I really need to know, if you can provide me a copy of all the interviews that are contain in the "discovery" material. Some might be useful to me in divorce proceedings. If you could do this at the earliest possible time, would be greatly appreciated, as Kat has informed me in letter that she already has a temporary hearing scheduled. She did not inform me as to when it is.

I ask this only for the impact

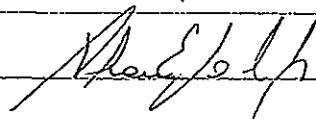
that it could have on me for my daughter. She is all I have left. Please.

If you could mail it to me, or even I could have my mother pick it up for me (if allowed), I do not want to ask you to take time out of your schedule to drop it by for me.

Our next visit, as something has occurred to me, I'd like to speak to you of the "interview" with the state police. It might or might not be of assistance, I just question a few things the more I think about it.

Thank you for your assistance in this matter, I again am sorry to be a burden to you, but the divorce and what is in it about my daughter is truly important to me. I hope you can understand.

Sincerely,



P.S. - If you would, or do contact my military lawyer, would you inform me of what is going on with this. Thank you.

Mr. Johnstone,

Sorry to bother you any further, its just that something is on my mind, and I can't stop thinking about it. I've written Mr. Daniels of it as well.

Its the fact that the DA has released information to Jim Craig. I never have had him as a lawyer retained by me.

Additionally, is the fact that he is deeply involved in the case itself. He has a vested interest in the case, what is said, and its outcome. (The fact that he doesn't want it to be known he was fooling around with my wife, or of the impact the phone conversation about him the night this happened with the wife I had.) It'd cause him and the firm alot of major embarrassment.

I'll not say I know a great deal of law, or the legal system, I don't.

But this seems a major in-justice to me.

It compromised my entire case. It has even had or is going to have an effect on my divorce. He just happens to be Kat's lawyer for this, as you already know.



I just don't think it was very ethical for the DA to do this, and is a gross negligence for telling or speaking of anything to Jim. Sorry, I'm upset.

But am I right?

Would you check over this for me? I'd really like to know why the DA did this and what he has to say of it.

As I said, I'm sorry I'm upset. It's just that the information given to Craig has had an impact on me, my relationship with my wife, and in the divorce, might cost me my only daughter. Can you blame me for being upset?

If you feel this isn't right, or if it could have any impact on my case, I have a couple of people who know Craig has spoken to the DA and gotten information. I've also a letter or two somewhere from Kat that tells of this as well.

It's just not right to me.

Please, let me know about this, if I'm right about it, or just "loosing it". Would you call me or visit (if possible) to let me know.

Thank-you,

*Steve E. Goff*

# **EXHIBIT 35-B**

Mr. Daniels,

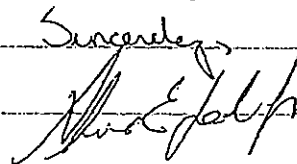
(pm) Wed 7 Feb

I'm again sorry to be a bother, but I'm affraid the previous three letters I've sent to you went to a wrong address.

I was told originally it was [REDACTED] now I hear its [REDACTED] I've asked my mother to confirm the correct address, as well as leave a message that I really need to speak to you at the earliest time you are available.

I'll not make this a long letter, but there is something we need to discuss. I covered it in the 3 previous letters, and I'm awful worried if the letters are returned to me here, they will be read (all mine is, I know this for a fact), and they were very private and if read, time sensitive.

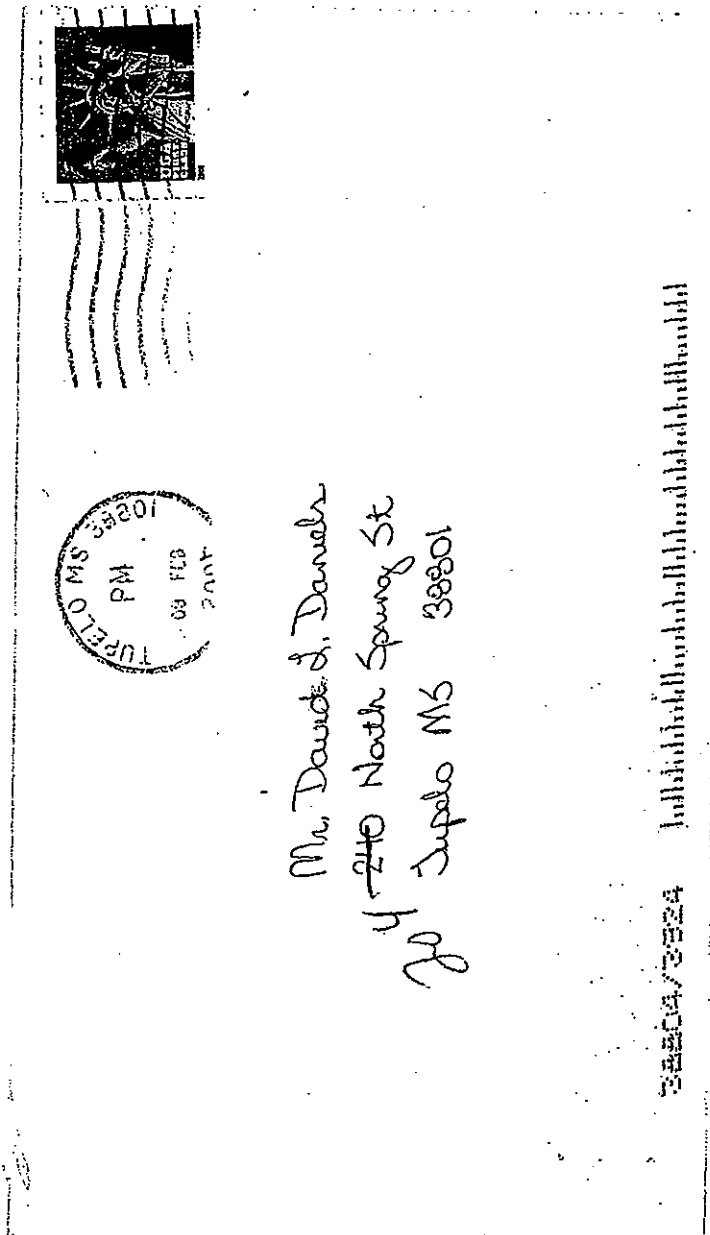
Thank you, I do appreciate your effort. I look forward to our meeting, as soon as you are available.

Sincerely,  


T. Loden

[REDACTED]

Fulton MS 38843



# **EXHIBIT 35-C**

Sir,

17 Feb 2001

I really do not mean to impose on you, I do really understand just how busy you must be.

I was just wondering if it would be possible to speak with you when you do become available. Even a phone conversation would be a great assistance.

I just have a few questions that are important to me. I'd like to ask of you if possible.

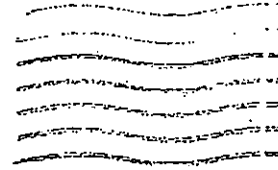
Some questions I do have could play a role in the divorce I am currently going through. Your input and guidance on the questions I do have, would allow me to make a better informed decision on some aspects contained in the divorce itself.

I thank you for your time, and any assistance you may provide.

Sincerely,  
Mark Self

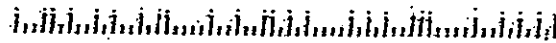
Thomas J. Oden

Tulsa MS 38843



Mr. David Daniels  
204 North Spring St  
Tupelo MS 38801

38804/3924



# **EXHIBIT 35-D**



**RECEIVED**

BY *gfw* DATE 4/3/01

Mr. Wells,

1 April 2001

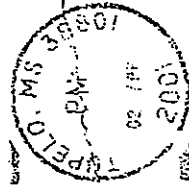
Thank you for your time and effort. I hope you have been able to contact the people you needed. I have sent word, but haven't heard back myself yet.

Oh, as for the "gas station" thing (sorry I can't be very specific, as I know all my in-coming and out-going mail is read), it is in the papers Mr. Daniels left me. Sorry, we just went over things several times before the tape was made. I was just confused. I do see in the statement, there is at least one part that was omitted. Could be in the "time-gap" on the tape.

If you need anything from me, feel free to ask. I'll cooperate in any way I can.

Again, thank-you.

*Alan E. Gelf*



Trace Index

Fulton MS 388415

Herb Wells and Associates

Attn: Herb Wells

Tupelo MS 38802-1012

# **EXHIBIT 35-E**

RECEIVED  
JUL 19 2011

Mr. Wells,

Thurs (am)

Sir, I'm sorry to bother you, I know you must be busy, but there is something or actually several things I'd like to discuss with you.

These could be important, as I feel they are, and need to be addressed as soon as possible, as they could effect the discovery deadline that has been set, or even for some motions Mr. Daniels & Johnstone may be working on.

I've attempted but have had no luck in getting to the phone for you, again I'm sorry to be a burden, forgive me please.

Thank you for your assistance thus far.

Also I'm sorry if at the last meeting I rambled or made little sense, I'm just having trouble sleeping for days, and find myself being very paranoid. I'll try to do better, sorry.

But please, if you could, schedule a visit over for these issues.

Thank you.

Sincerely,

Paul Jelf

Tom Loden

[REDACTED]  
Fulton MS 38843



Heerb Wells & Associates  
Attn: Heerb Wells



Tupelo MS 38802-1012

38802X1012 10 [Barcode]

# **EXHIBIT 35-F**

**RECEIVED**

5/17/01

Mr. Wells,

Wed. 15 May 2001

I can't thank you enough for your visit. I have really been struggling lately, the isolation and games had gotten to me so badly. You can't believe the effects of these mind games or the pure isolation has had, my paranoia ran wild.

I'd really appreciate it if you would stop by prior to the trip to see Kat.

If you speak to her before, or if you'd call her just for this, could you try to explain things to her. I'm so worried that my paranoia has effected our relationship (I know I've written some strange letters to her, I regret this so now).

When I spoke to her last time, I got caught totally off guard when she told me the DA had said she'd be called as a "rebuttal witness". I reacted poorly I'm afraid. I didn't understand exactly what it was about or why they asked her "if he's admitted any thing more" to her.

I see now the games being played, putting her against me, and then trying to get me to become angry at her. Its quite clear to me now, it nearly worked.

I humbly beg you to please try to express all of this to her. I've written again, but worried yet. You speaking to her could go a long way for me, please.

I hate to ask, but it is this important to me, she is the love of my life, and I hate what this has done.

Also if you'd pass along my apologies to Mr. Daniels & Johnstone as well, sorry also for this.

I just haven't handled things very well, sorry.

If I could remind you, could I have a copy

# **EXHIBIT 35-G**



Mr. Daniels,

(am) Wed 23 May 2001

I know you must be really busy, I'm sorry to bother you again.

Its just I haven't heard from you in a little while and I understand either Herb Wells or you will be going to speak to my wife, I heard this week, from her.

I need to see which ever of you that is planning on going before you speak to her.

There are several specific questions I'd like of you to ask. Her answers will have a major influence on what I decide to do.

I also request a copy of all the discovery material be given to me, on your next visit here.

I know there are several hiding things, and lying about some things. My paranoia is getting the best of me now, I'd just like to see in the discovery who has said and done what. The Marner will not even answer my letters or calls now either.

Have you heard from them, specifically Capt. Charney? I've no idea as to my status.

Herb in his last visit here spoke of you having to turn in a list of people to testify. I'd like to speak of this to you, and the discovery might help me determine a few.

Hope your holiday was nice, I thank you for your time & effort.

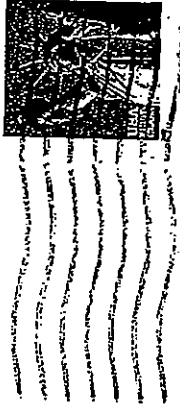
Looking forward to your visit.

Sincerely,

Tom Loden

Tom Lodge

Fulton MS 30843



Mr. David L. Daniels  
204 N. Spring St.  
Tupelo MS 38801

中國國際貿易中心

# **EXHIBIT 35-H**

**REC** **VED**  
 BY *hew* DATE *6/11/01*

Mr. Wells,

am Thurs 7 June

Thanks for speaking to Kat. I'd love to discuss it and some more with you when ever you are available.

I spoke to Mr. Daniels briefly, her to try to come back he said Sat or Monday. I've so much to question & say. While here, he provided me a copy of your interview with Kat. I just wish it told "how" she reacted, I hope when you come you'll fill me in, its important.

Im that I saw and read your comments and have some to expand on this, a little more, more in person. Hope you follow.

Page 2; 1<sup>st</sup> note: both of us and more. I was honest when I told you what they'd be on it, but reversal used it. I had an "automatic" sign on, anyone could have. More on this in person.

Page 2-note 2: More in person, but hidden.

Page 2-note 3: This is what I've said all along, its the truth. I question the dates, not right. Also "ending" of mine not in the transcript at all. Erased? Then the person I told you about.

Page 2-last sentence: I still question his involvement and intent.

Dwore papers are being mailed off today to her. She withdrew the original "grounds".

Theres several issues I'd like to speak of if you could come, and a few people you may want to speak with soon, before next motions.

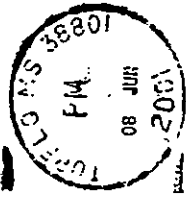
Thanks, I mean it,

Oh, I got Captain Chaney from the Mariner more in person on this as well,

Tom Jaden

Tom Laden

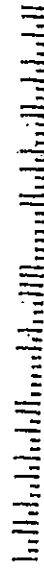
Fulton MS 38843



Herb Wells and Associates  
Attn: Herb Wells

[REDACTED]  
Tupelo MS 38802-1012

38802X1012 10



# **EXHIBIT 35-I**

Mr. Daniels,

am Thurs 14 June

Sorry to write again, but I just recieved my discharge papers from the Marines. It wasn't as bad as it could have been, I'll fill you in next meeting, but things are wrong.

But there are mistakes in it that I need to address and attempt to fix as soon as possible with the Marines or the VA. In order to try for any benefits for my wife and daughter, I have to correct this.

I'd like to ask, sorry to impose more than already, for copies of all my military records. As I understand from my mother, she gave you the only copies she had, and I need a copy now for the VA. Sorry, really.

Sir, I really hate to bother you for this, but its for my daughter's benefit I ask.

If you or Mr Wells could drop these with the other delivery it'd be appreciated.

Can any other military documents or even personell be suprased, this is a question I have before I "step on some toes".

I do look forward to a visit.

Thank you

Sincerely,  
Tom Loden

# **EXHIBIT 35-J**



Mr. Daniels,

Friday 27 July

I do so hope you have gotten my apology letter, and you can understand a little of how I feel. I do hate to intrude or impose on you or Mr. Johnstone, truly I do.

Yet there so much I continue to ponder over. I do profess to be a lawyer, far from it, I just see things and question. Forgive me this...

The latest is dealing of an issue I've mentioned already, but different as to how it may apply. Its of my "initial appearance", and a possible care point of law with it.

As I've written, and as detailed in the discovery, at the time of the initial appearance, I was under doctor's orders. These orders said that due to effects of medication, I shouldn't make important decisions, and many other things.

My question and legal point is this.

If I wasn't fully in control mentally at the time, how could I have understood all aspects of what I was charged with and the possible ramifications?

Point being, if I didn't understand the nature of the charges, how could I later fully judge the total effect of the statement I was tricked/forced into giving?

# **EXHIBIT 35-K**

Mr. Daniels, ~~at about 10:00 am~~ pm Sunday.

There is little else I can say, just that I need to speak with you or Mr Johnstone as soon as possible.

Please,

I must request this, I am so sorry to impose, but I must ask.

I have new information, important news that I must speak in person to you of.

I beg you this.

Thanks.

Sincerely,

Tom Loden

- I'll ask to phone you, or for a message be left that I'm trying to contact you.

Thank-you

Either you or Mr Johnstone would be alright, but I really need to see one of you if at all possible, please.

Thank-you

-over-

# **EXHIBIT 35-L**

**RECEIVED**

107 ~~414~~ DATE 8/18/01

Mr. Wells,

17 August

I thought I'd drop a few lines to you, as I haven't written in a while. Also I just found a stamp, I'd thought I were out.

I guess you heard about the mess up last week as for the doctor's visit. I fell through the crack, got forgotten. But it went this past Monday.

I'm wondering if you have heard anything back of what you spoke to me of last visit. I'm just curious, and would really like to know of it.

Also, I'm rather concerned about my mother. I've not been given any letters since Tuesday. She writes me everyday, and yesterday was my birthday. It's not like her. Either that or someone is just purposely holding my mail. I'll ask today, and for a shaver, maybe a phone call as well.

If you're not over-loaded with work, I'd appreciate it if you could visit again if possible.

There is one additional thing I desire to inquire to you about.

Also, I'm afraid I've offered my lawyer's, Mae on this and the other in person, if you can visit.

Thanks for everything, looking forward to a visit.

Sincerely,  
Tom Loden

T. Loden

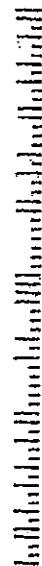


Herb Wells and Associates  
Attn: Herb Wells



Tupelo MS 38802-1012

38802X1012 10



# **EXHIBIT 36**

**IN THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI****STATE OF MISSISSIPPI****VS.****CAUSE NO. CR00-068****THOMAS EDWIN LODEN, JR.  
DEFENDANT****ITEMIZED STATEMENT FOR COMPENSATION AND EXPENSES**

Pursuant to statutory authority and *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990), the undersigned attorney does hereby make a claim for compensation and expenses for representation in the total amount of Twelve Thousand, Nine Hundred, Seven Dollars and fifty-five cents (\$12,907.55), itemized as follows:

**I. TIME SPENT IN PREPARATION (OUT OF COURT)**

<u>DATE</u>	<u>DESCRIPTION OF ACTIVITY</u>	<u>HOURS</u>
01-09-01	Conference with Jim Johnstone and Travel time round trip to Pontotoc - 30 miles	4.0 hrs.
01-11-01	Conference with Jim Johnstone and Court Administrator	2.5 hrs.
01-25-01	Reviewed discovery	3.0 hrs.
01-29-01	Reviewed discovery	3.0 hrs.
01-31-01	Conference with Court Administrator RE: venue	1.0 hr.
01-31-01	Conference with Jim Johnstone and Tom Loden Travel time round trip to Fulton - 60 miles	2.5 hrs.
02-05-01	Conference with Jim Johnstone, Drafted Venue Request	2.5 hrs.
02-14-01	Located and conferenced with Affiant RE: Venue change	6.0 hrs.
02-15-01	Research and review RE: Pretrial Motions	3.0 hrs.
01-19-01	Research and review RE: Pretrial Motions	4.0 hrs.



02-19-01	Located and interviewed second affiant RE: venue change; Executed affidavit and Travel time round trip to Fulton - 60 miles	4.5 hrs.
02-28-01	Conference with Jim Johnstone RE: Pretrial Motions	5.0 hrs.
03-01-01	Motion Research and Preparation	5.0 hrs.
03-07-01	Conference with Herb Wells, review of discovery, copied discovery for Herb Wells	5.0 hrs.
03-14-01	Conference with Herb Wells and Tom Loden Travel time round trip to Fulton - 60 miles	3.5 hrs.
03-20-01	Conference with Clay Joyner and Jim Johnstone	2.5 hrs
03-21-01	Inspection/tangible evidence	4.0 hrs.
03-28-01	Inspected van, interview with Investigator Marlar Travel time round trip to New Albany - 80 miles	2.5 hrs.
04-04-01	Conference with Tom Loden Travel time round trip to Fulton - 60 miles	2.5 hrs.
04-20-01	Conference with Tom Loden Travel time round trip to Fulton - 60 miles	1.5 hrs.
04-06-01 - 04-20-01	Acquired documents for psychological examination; forwarded to Whitfield	3.5 hrs.
04-24-01	Conference with District Attorney, Judge Gardner, and Jim Johnstone; Motion Hearing Preparation	5.0 hrs.
05-16-01	Conference with Tom Loden Travel time round trip to Fulton - 60 miles	1.5 hrs.
05-17-01	Conference with Military Lawyer, Gregory L. Chaney	1.5 hrs.
06-05-01	Conference with Herb Wells RE: Suppression of Evidence	2.0 hrs.
06-08-01	Conference with Tom Loden's mother and sister, RE: Suppression of Evidence Travel - 20 miles	2.5 hrs.
06-18-01	Conference with Rena Loden, surveyed house and surrounding	4.0 hrs.

# **EXHIBIT 37**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

*Mississippi Supreme Court Case No. 2007-DR-01758-SCT  
Itawamba County Case No. 03-090(G)1*

---

*THOMAS EDWIN LODEN, Petitioner*

*v.*

*STATE OF MISSISSIPPI, Respondent*

---

**AFFIDAVIT OF THOMAS E. LODEN, JR.**

State of Mississippi  
Sunflower County


Thomas E. Loden, Jr., first being sworn, testifies to the following under oath:

1. I am over 21 years of age, and otherwise competent to testify. I am incarcerated at Parchman Penitentiary.
2. I have reviewed the State's Response brief where the State argues that it would not have mattered even if Daniels and Johnstone had conducted an adequate mitigation investigation because I would have prevented the introduction of any mitigation investigation. That is not true. I never instructed David Daniels or James Johnstone not to investigate mitigation evidence. To the contrary, I constantly urged them to investigate the case fully, and wrote them dozens of letters to pleading with them to do more work on the case. If Daniels and Johnstone had told me that they had developed mitigation evidence that they were

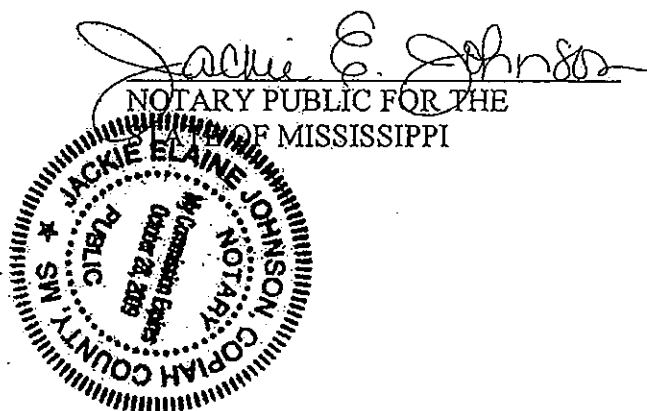
prepared to present, I would definitely have wanted it presented. Counsel did not develop any mitigation evidence as far as they told me.

3. I have read the January 23, 2009 affidavit of David Daniels in which he claims that he conducted a mitigation investigation and, as part of his investigation, he interviewed my mother and sister regarding mitigation evidence.
4. I asked my mother and my sister to speak with Daniels about my living conditions in the jail before trial. They said that they would try to contact Daniels to discuss the jail conditions. My mother then told me that she had spoken to Daniels about the jail conditions, but she did not say that she and Daniels discussed mitigation evidence, or my background. Daniels never told me that he spoke to my mother, my sister, the military or anyone else in an effort to obtain mitigation evidence that could be presented in the penalty phase of trial.

FURTHERMORE AFFIANT SAYETH NOT

  
THOMAS E. LODEN, JR.

Sworn to and subscribed before me  
this 5<sup>th</sup> day of June 2009.



# **EXHIBIT 38**

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

*Mississippi Supreme Court Case No. 2007-DR-01758-SCT*  
*Itawamba County Case No. 03-090(G)1*

---

*THOMAS EDWIN LODEN, Petitioner*

v.

*STATE OF MISSISSIPPI, Respondent*

---

AFFIDAVIT OF BOBBIE CHRISTIAN

State of Mississippi  
Lee County

Bobbie Christian, first being sworn, testifies to the following under oath:

1. I am over 21 years of age, and otherwise competent to testify.
2. I currently reside in Tupelo, Mississippi.
3. I am Thomas Edwin Loden, Jr.'s mother. Like the rest of the family, I call him "Eddie."
4. My meeting with Eddie's attorney, David Daniels, lasted only about 15 to 20 minutes. My daughter Anita was present at this meeting. Mr. Daniels did not meet with me again and did not call with further questions.
5. I never had a meeting with Mr. Daniels in which Sonia Brown, my daughter and Eddie's half-sister, was present.
6. During my meeting with Mr. Daniels, he asked if I thought Eddie was guilty and if I had any information about the crime. I told him that I did not know anything


about the crime and did not know what to say. Mr. Daniels also asked if I was able to visit Eddie in prison.

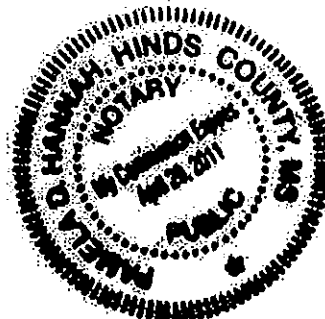
7. Mr. Daniels never asked about Eddie's family history. Mr. Daniels never asked about Eddie's wives or his daughter, Abby. Mr. Daniels never asked about Eddie's father, stepmother, or grandparents.
  8. Mr. Daniels never asked about Eddie's military experience or if I was aware of any psychological problems Eddie had due to his military service.
  9. Mr. Daniels never asked me about other witnesses that might be helpful, or for their contact information.
  10. Since I submitted my affidavit in support of Eddie's Petition for Post Conviction Relief, I have learned that Mr. Daniels submitted an affidavit declaring that he discussed Eddie's family history and background with Eddie's sister and me.
- This is not true. I have never had such a conversation with Mr. Daniels.

FURTHERMORE AFFIANT SAYETH NOT

  
BOBBIE CHRISTIAN

Sworn to and subscribed before me  
this 19 day of May 2009.

  
NOTARY PUBLIC FOR THE  
STATE OF MISSISSIPPI



# **EXHIBIT 39**



IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Mississippi Supreme Court Case No. 2007-DR-01758-SCT  
Itawamba County Case No. 03-090(G)1

---

THOMAS EDWIN LODEN, *Petitioner*

v.

STATE OF MISSISSIPPI, *Respondent*

---

AFFIDAVIT OF SONIA W. BROWN

State of Mississippi  
Lee County

Sonia W. Brown, first being sworn, testifies to the following under oath:

1. I am over 21 years of age, and otherwise competent to testify.
2. I currently reside in <sup>SB</sup> ~~Tupelo~~, Mississippi.
3. Thomas Edwin Loden ("Eddie") is my half-brother. My parents are Billy Brown, <sup>Belden</sup> Sr., and Bobbie Christian, Eddie's mother.
4. Eddie's trial attorney, David Daniels, never contacted me to discuss Eddie's family history or background.
5. The only time I came close to speaking with Mr. Daniels was once in court, but Mr. Daniels would not speak with me.
6. Since I submitted my affidavit in support of Eddie's Petition for Post-Conviction Relief, I have learned that Mr. Daniels submitted an affidavit declaring that he

# **EXHIBIT 40**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

*Mississippi Supreme Court Case No. 2007-DR-01758-SCT  
Itawamba County Case No. 03-090(G)1*

---

*THOMAS EDWIN LODEN, Petitioner*

*v.*

*STATE OF MISSISSIPPI, Respondent*

---

**AUTHENTICATION OF TRIAL COUNSEL'S RECORDS**


I, Mark R. McDonald, do declare as follows:

1. I am a member of the State Bar of California (Bar No. 137001) and a partner of the law firm of Morrison & Foerster, LLP, counsel of record for Petitioner Thomas Edwin Loden. I make this declaration on personal knowledge. If called as a witness herein, I could and would testify competently to the matters set forth below. I file this declaration in support of Mr. Loden's Petition for Post Conviction Relief.
2. In connection with the above matter, Loden's prior counsel sent me Loden's case files containing attorney work product, discovery materials, court documents and other records kept by Attorneys David Daniels and James Johnstone in the course of their representation of Loden.

3. These records include the letters written by Loden to his trial attorneys and Herb Wells, attached hereto as Exhibit 35.
4. These records also include the timenotes of attorney David Daniels, attached hereto as Exhibit 36.

Executed this 22nd day of June 2009 at Los Angeles, California.

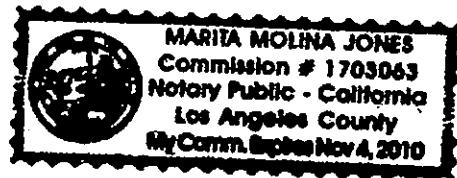
FURTHER AFFIANT SAYETH NOT.

  
MARK R. MCDONALD

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES )

Subscribed and sworn to before me on this 22nd day of June, 2009, by  
MARK R. MCDONALD who proved to me on the basis of  
satisfactory evidence to be the person(s) who appeared before me.

Signature: marita molina jones (seal)



# **EXHIBIT 41**

STATE OF MISSISSIPPI

COUNTY OF LEE

AFFIDAVIT

Personally appeared before me, the undersigned authority, in and for the State and County aforesaid, David Daniels, who by me first being duly sworn, states under oath the following:

1. That I represented the defendant, Thomas Edwin Loden, Jr., on a charge of Capital Murder, prior to my becoming employed with the District Attorney's Office, which prosecuted the case.
2. I conducted extensive investigation into the facts of the case, and into mitigation factors, which included interviews with my client, military personnel, his family and friends.
3. Much of the factual information about the case I gained through discovery from the State.
4. At no time have I disclosed any of the information I acquired during my representation of the defendant, to anyone, including any employees of the Office of the District Attorney. Further, I do not intend to ever disclose any information I gained during that representation to anyone.
5. Further, affiant saith not.

Dated, this the 2<sup>d</sup> day of September, 2003.

  
\_\_\_\_\_  
DAVID LEE DANIELS  
Assistant District Attorney

Exhibit

A 1

41

FILED

SEP 3 0 2003

Carol Gates, Circuit Clerk  
DC 2

STATE OF MISSISSIPPI

COUNTY OF LEE

Personally appeared before me, the undersigned authority, in and for the State and County aforesaid, the above signed David Daniels, who, by me first being sworn, did state on his oath that the facts and circumstances recited in the above Affidavit are true and correct to the best of his belief and knowledge, and that he signed the document on the day and date therein mentioned.

This 3rd day of September, 2003.

Marilyn S Reed  
NOTARY PUBLIC

My Commission Expires:

12/22/06

Exhibit A2

42

**FILED**

SEP 30 2003

Carol Gates, Circuit Clerk  
DC 12

# **EXHIBIT 42**



IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

*Mississippi Supreme Court Case No. 2007-DR-01758-SCT  
Itawamba County Case No. 03-090(G)1*

---

*THOMAS EDWIN LODEN, Petitioner*

*v.*

*STATE OF MISSISSIPPI, Respondent*

---

**AFFIDAVIT OF MARK R. MCDONALD**

I, Mark R. McDonald, do declare as follows:

1. I am a member of the State Bar of California (Bar No. 137001) and a partner of the law firm of Morrison & Foerster LLP, counsel of record for Petitioner Thomas Edwin Loden. I make this declaration on personal knowledge. If called as a witness herein, I could and would testify competently to the matters set forth below. I file this declaration in support of Mr. Loden's Motion for Leave to File Reply to State's Response to Motion for Stay of Post-Conviction Proceedings.
2. I traveled to Mississippi in August 2008 to attempt to meet with attorneys James Johnstone and David Daniels, among others, and to conduct investigation. I was aware of attorney Daniels' prior declaration wherein he stated that he would not speak about this case further but I wanted to at least let him know of our representation of Mr. Loden.
3. I met with attorney Johnstone in his office for approximately an hour on about August 6, 2008. I asked him if he would be willing to execute an affidavit that we could use

in support of Mr. Loden's petition for post-conviction relief. Attorney Johnstone said that he would review a draft declaration and execute it if it was accurate.

4. On that same trip to Mississippi in August 2008, I telephoned attorney Daniels to see if he would speak to me. Attorney Daniels did not take the call or return my call. However, while I was in the courthouse reviewing evidence, I walked to the District Attorney's office and asked if attorney Daniels was there. I was told he was not. Later that afternoon while I was reviewing evidence, attorney Daniels came into the room and said that he heard that I was looking for him. I asked attorney Daniels if we could speak privately but he was unwilling to do so. We spoke for approximately 10 minutes in the presence of Lieutenant Mickey Baker, one of the investigating officers, and Stacy Ferraro, our co-counsel. Assistant District Attorney Farris may also have been present. Given that many of the subjects I wanted to discuss with attorney Daniels involved communications between Loden and Daniels, I did not want to discuss those matters in the presence of Mr. Baker and Mr. Farris. Therefore, not only was the conversation very short, it was necessarily narrowly confined in scope. During my conversation with attorney Daniels, he did not indicate in any way that he would be willing to execute an affidavit or do anything that might assist Loden. To the contrary, attorney Daniels told me that he was done with this case and did not want to be involved in it.
5. In about October 23, 2008, our co-counsel, Stacy Ferraro, provided attorney Johnstone with the draft of his affidavit. Attorney Johnstone said that he would review it and get back to Ms. Ferraro or me.

6. Thereafter, I made repeated calls to Mr. Johnstone's office but Mr. Johnstone was never available to take my call. Although I left my telephone number on numerous occasions, Mr. Johnstone never called me back.
7. Based on that history, I concluded that attorney Johnstone was not going to execute an affidavit. Attorney Daniels had already indicated he would not execute an affidavit. We therefore prepared and filed a motion seeking to take the deposition of attorneys Johnstone and Daniels, which was filed on December 4, 2008. Loden's Petition was due on December 8, 2008.
8. On Friday, December 5, 2008, attorney Johnstone telephoned me. He said that he had reviewed the draft affidavit. We went over the affidavit, I made a few changes he requested, and I sent the revised affidavit to him later that afternoon.
9. On Monday, December 8, 2008, attorney Johnstone returned the executed affidavit to me and we were able to file his affidavit that day with Mr. Loden's Petition.

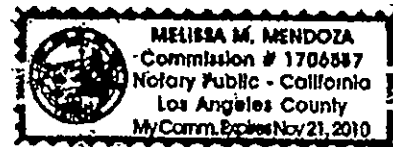
FURTHER AFFIANT SAYETH NOT.

  
MARK R. MCDONALD

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES )

Subscribed and sworn to before me on this 12<sup>th</sup> day of February, 2009,  
by Mark R. McDonald, who proved to me on the basis of  
satisfactory evidence to be the person(s) who appeared before me.

Signature: Melissa M. Mendoza (seal)



# **EXHIBIT 43**

1 IN THE CIRCUIT COURT OF ITAWAMBA COUNTY, MISSISSIPPI

2  
3 THOMAS LODEN

PLAINTIFF

4 VERSUS

CAUSE NO. CV03-090

5 STATE OF MISSISSIPPI

DEFENDANT

6  
7 TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE HEARING  
8 IN THE ABOVE-STYLED AND NUMBERED CAUSE, BEFORE THE  
9 HONORABLE THOMAS J. GARDNER III, CIRCUIT JUDGE, FIRST  
10 JUDICIAL DISTRICT OF MISSISSIPPI, IN THE LEE COUNTY  
11 COURTHOUSE ON THE 20TH DAY OF APRIL, 2009.  
12

13  
14 APPEARANCES:

15  
16 Present and Representing the Defendant:

17 **HONORABLE GLENN S. SWARTZFAGER**  
18 **HONORABLE STACY FERRARO**  
The Mississippi Office of  
Capital Post-Conviction Counsel  
19 Post Office Box 23786  
20 Jackson, Mississippi 39225

21 Present and Representing the State of Mississippi:

22 **HONORABLE DENNIS H. FARRIS**  
District Attorney  
23 Post Office Box 7237  
24 Tupelo, Mississippi 38802

25 **HONORABLE (SONNY) MARVIN WHITE**  
Office of the Attorney General  
26 Post Office Box 220  
27 Jackson, Mississippi 39205-0220  
28  
29

1           **THE COURT:** So I'll understand exactly what  
2           we're going to do here about the Loden matter --  
3           first of all, Mr. Loden is not with us. And  
4           I'll read to you what my docket says, and you  
5           tell me what that means: Hearing on motion to  
6           protect petitioner's right to due process of law  
7           and to a full, fair, and effective  
8           post-conviction process, number one; for  
9           discovery of all communications between the  
10          Court or Court personnel and State officials or  
11          attorneys; and for a protective order regarding  
12          Mr. Loden's private mental health information;  
13          and production of the complete State hospital  
14          file to you, counsel for the petitioner, and  
15          other relief.

16                 What does this first thing mean, due  
17                 process, full, fair, and effective -- I don't  
18                 know that there is any intent to deprive him of  
19                 that, but what specifically do you want me to  
20                 do?

21                 **MR. SWARTZFAGER:** Well, Your Honor, there's  
22                 two things. Do you want me to approach?

23                 **THE COURT:** You can stand right there will  
24                 be fine.

25                 **MR. SWARTZFAGER:** Thank you, Your Honor.  
26                 On that one, what we're seeking are two things.  
27                 Is there was some kind of communication between  
28                 Mr. White and the Court, and we don't know  
29                 exactly how that took place, what it is. We'd

1           like to know how that came about.

2           And the other thing is some of this has  
3           been mooted out since it's been filed, is there  
4           were, we feel, records obtained by the State,  
5           and we believe due process requires that we be  
6           allowed to see exactly what the State did get  
7           from Whitfield in that sense.

8           **THE COURT:** What does that have to do with  
9           his having been convicted and sentenced?

10          **MR. WHITE:** I have no problem, Your Honor,  
11          with letting them see what I got from Whitfield.

12          **THE COURT:** That's fine.

13          **MR. WHITE:** It's Exhibit No. -- exhibit to  
14          their post-conviction petition.

15          **THE COURT:** Well, is that an extra copy  
16          they can have?

17          **MR. WHITE:** Well, no, this is the only copy  
18          I have. I have not made any copies of it.  
19          After I discovered --

20          **THE COURT:** Why don't we, here in just a  
21          minute, you can look at it. While we're doing  
22          something else, you can look at that and see  
23          what that is.

24          **MR. SWARTZFAGER:** Yes, sir.

25          **THE COURT:** And as far as communication  
26          goes, we'll make that -- I will tell you exactly  
27          what the circumstance is.

28          Protective order having to do with private  
29          mental health information. I assume you are

1 asking that I enjoin everyone from looking at  
2 it, using it, or talking about it.

3 MR. SWARTZFAGER: Well, Your Honor, I  
4 believe at this point the State has gotten ahold  
5 of it, and it was filed prior to that. And we  
6 wanted to ensure that it was obtained in a fair  
7 and proper manner, according to due process, so  
8 we could see what happened.

9 But in any event, it appears Mr. White has  
10 got it. If we can inspect that, it may resolve  
11 all that, with the exception of the ex parte  
12 communication.

13 THE COURT: I've got another case ahead of  
14 you, and I'm going to -- at least we're getting  
15 a starting point here.

16 And for you to receive the complete State  
17 hospital file. Of course, I have no objection.  
18 There's not a problem with me with that. I  
19 assume they would turn it over to you. Maybe  
20 they will require something, but that's between  
21 you and them, as far as I'm concerned. Or I'll  
22 order it if you wish me to.

23 MR. SWARTZFAGER: Yes, sir.

24 THE COURT: And other relief.

25 MR. SWARTZFAGER: I think we've covered  
26 everything, Your Honor.

27 THE COURT: All right. Well, why don't  
28 you -- I was trying to think what's available.  
29 There are some witness rooms. If you want to



1 just step out and find one of these witness  
2 rooms and look at that, I'll be -- I don't think  
3 this is going to take very long, the other  
4 matter I'm talking about that is before you on  
5 the docket.

6 MR. SWARTZFAGER: Yes, sir.

7 THE COURT: I don't think that's going to  
8 take long.

9 (BRIEF RECESS.)

10 MR. SWARTZFAGER: I'm giving you everything  
11 back.

12 THE COURT: Now, let's -- I think that you  
13 have now seen and examined what was obtained by  
14 the attorney general's office from the --

15 MR. SWARTZFAGER: That's correct, Your  
16 Honor.

17 THE COURT: -- from the State hospital.

18 Now, I suppose that the other part of that  
19 question is, how did that come to be?

20 MR. SWARTZFAGER: Yes, sir.

21 THE COURT: All right. I'll tell you.

22 MR. SWARTZFAGER: Thank you, sir.

23 THE COURT: At the request of Mr. White,  
24 who asked me if he could have access to those, I  
25 wrote a letter to the Mississippi State Hospital  
26 asking them to provide him with that. And  
27 that's how it happened.

28 MR. SWARTZFAGER: Yes, sir. And part of  
29 the motion is, what we would ask is that on

1 anything like -- I don't think there is going to  
2 be anything in the future in this case, but  
3 should there be, that we're entitled to notice  
4 of those sorts of things, Your Honor.

5 THE COURT: Well, and my candor may be --  
6 I'm not sure. But my opinion about this is,  
7 with the history of this case -- and bear in  
8 mind, I've been with it from pretty early on.  
9 And I'm aware that your client underwent an  
10 evaluation, and that at that point there was a  
11 considerable amount of information flowing  
12 around about his then and present mental state,  
13 all of which were in the hands of the State and  
14 the defendant, I thought.

15 In any event, there is authority in this  
16 state for the waiving of any privilege that  
17 might exist in matters of that nature based on  
18 the commission of a heinous offense.

19 And I, for the life of me, cannot  
20 understand how you could stand on two feet with  
21 a straight face and argue that this somehow has  
22 any bad result as to your client. He has  
23 been -- he waived the trial, pled guilty, and at  
24 a sentencing hearing was sentenced. And I knew  
25 all about him. I had had the benefit of all of  
26 the information you've probably seen.

27 MR. SWARTZFAGER: Yes, sir.

28 THE COURT: I would think you had. So do  
29 you have any specific questions for me or

1 Mr. White, I assume?

2 MR. SWARTZFAGER: Well, I think it's --  
3 again, I think that's -- you know, maybe put on  
4 the record as to what happened. And again is,  
5 what we're saying is, you know, when someone  
6 asks the Court for relief, the other side is  
7 entitled to notice, to respond or not, Your  
8 Honor. That's all we're asking is if in the  
9 future there is anything, we be given any sort  
10 of notice on that.

11 THE COURT: Tell me, did you not have this  
12 information?

13 MR. SWARTZFAGER: Yes, sir, we did. But  
14 there was a communication between Mr. White and  
15 the Court.

16 THE COURT: Oh, I understand that. I  
17 understand you are trying to make a mountain out  
18 of a mole hill.

19 MR. SWARTZFAGER: No, sir, I'm not trying  
20 to make a mountain out of a mole hill, but I  
21 think we're entitled to notice under the  
22 constitution and the rules of the court.

23 THE COURT: I quite candidly told you. You  
24 now know.

25 MR. SWARTZFAGER: Yes, sir. And all we're  
26 asking is in the future that we be given notice  
27 on anything.

28 THE COURT: As a matter of fact, as  
29 evidence of the fact that I didn't consider it

1 to be of any great significance, the very day  
2 that I signed it, I had a copy of it sent to  
3 you. If I was trying to conceal anything from  
4 you or act in any derogation of any right your  
5 client had, I would, don't you think, have not  
6 done that?

7 MR. SWARTZFAGER: We're not suggesting that  
8 the Court was trying to conceal anything, Your  
9 Honor. All we're asking is that the rules be  
10 followed.

11 THE COURT: I am amazed that the State  
12 didn't have all that. I felt that they did have  
13 it, because all of that was kind of freely  
14 available during all of the discovery going on,  
15 and I really thought that it might be in the  
16 DA's office here. But nevertheless, you now  
17 know.

18 Yes, sir?

19 MR. WHITE: If I just may add this: I  
20 apologize to the Court for putting you in this  
21 position. I'm -- of course, I was making the  
22 request based on this Court's order sending him  
23 for a mental examination, which instructed that  
24 the report be sent to the district attorney, to  
25 you, and to defense counsel.

26 When I called, because we are the successor  
27 in interest of the district attorney in this  
28 case, I called Whitfield and asked for the  
29 report. Dr. McMichael said he did not feel

1 comfortable since I was not specifically listed  
2 in the order. And I probably could have called  
3 Johnny, and he could have made the call because  
4 he is the district attorney.

5 I called you, and you sent the letter.  
6 That's all that happened. And I don't think  
7 this is a matter of discovery because it was  
8 already -- the State was already entitled to it  
9 by your original order.

10 THE COURT: And this is what I was saying  
11 while ago. I thought this was information  
12 everybody had, and I was kind of amazed that the  
13 attorney general's office didn't have a copy of  
14 it. You know, I did not in any way feel that I  
15 was violating any confidence or any right that  
16 the defendant had. I try to be very careful  
17 about that, Counsel.

18 So any -- do you have any other questions  
19 about it? While we're here, let's --

20 MR. SWARTZFAGER: No, sir. I think it's  
21 resolved.

22 THE COURT: You know.

23 Now, protective order regarding Mr. Loden's  
24 private mental health information. Tell me  
25 what -- specifically, what do you intend by  
26 this?

27 MR. SWARTZFAGER: Well, Your Honor, let me  
28 say this: I think what we've done by seeing  
29 what the State has gotten -- because the

1 information was disclosed. We filed it before  
2 the information -- Whitfield gave the  
3 information to Mr. White. It's been given. I  
4 think that's moot.

5 I think any relief that we were asking for  
6 in the motion, the Court has addressed in that  
7 motion. And I don't believe there is  
8 anything -- any other issues in that motion that  
9 we wish to present to the Court.

10 **THE COURT:** All right. Very well, then.

11 And production of the complete State  
12 hospital file. You don't have that?

13 **MR. SWARTZFAGER:** There is some raw data,  
14 or should be, correct me if I'm wrong, on the  
15 psychological testing. I don't believe the  
16 State has it either.

17 **MR. WHITE:** No, they won't give you the raw  
18 data. It's unethical for them to provide an  
19 attorney with the raw data, although some  
20 psychologists, some of the people they've hired,  
21 have done so, which we'll bring up at the proper  
22 time.

23 **THE COURT:** Well, I would assume that, like  
24 lots of things that might have some initial  
25 impressions, provisional diagnoses, et cetera,  
26 et cetera, that they don't really care to share  
27 with anyone. So I don't know what their  
28 attitude is. By apparently what you say, I'm  
29 satisfied with that.

1 And so I guess -- have you talked with  
2 Dr. McMichael about that?

3 MS. FERRARO: Not recently, no. I haven't.

4 THE COURT: What is his attitude about it?  
5 I think he's -- well, he would probably go to  
6 Sonny White and ask for advice on the matter.

7 MS. FERRARO: I don't think Whitfield will  
8 release raw data unless you're a doctor. So I  
9 think that if that's all the file they got, our  
10 concern was that there was additional notes or  
11 something that we didn't get from the original  
12 order. And that -- your letter said the  
13 complete Whitfield file, and so just making sure  
14 that we all have the -- are on the same page, I  
15 think, is what we're doing.

16 THE COURT: Well, again, you know, I  
17 couldn't understand why Sonny White didn't have  
18 it. It had been --

19 MS. FERRARO: I didn't either. I didn't  
20 either.

21 MR. SWARTZFAGER: We didn't either, Your  
22 Honor.

23 THE COURT: It had been bantered about. At  
24 that point there was no privilege attached to it  
25 in any event, but because everybody had it.

26 MR. WHITE: Just -- I'll say this: After I  
27 had done this or had gotten this, this is the  
28 second stack of their exhibits to their  
29 post-conviction, which I hadn't gotten to that

1 point yet, it appears as Exhibit 28-J to their  
2 post-conviction petition.

3 So, you know, I had it, but didn't know I  
4 had it at the time that I asked, because they  
5 were making allegations about the report. And  
6 the report that was sent to the Court, the  
7 summary report that was sent to the Court, does  
8 not contain that information.

9 THE COURT: Okay.

10 MR. WHITE: And I just wanted the full  
11 report and then discovered I had it after all.

12 THE COURT: All right. So --

13 MR. SWARTZFAGER: Yes, sir. And again, the  
14 State didn't get anything we didn't get, after  
15 we examined the information that Mr. White  
16 kindly provided us this morning -- or this  
17 afternoon.

18 THE COURT: All right. So, Counsel, I  
19 cannot say that I would not under any  
20 circumstances order the State hospital to  
21 produce their entire diagnostic records, but  
22 absent some necessity -- you've got the reports,  
23 two versions or more, I don't know how many -- I  
24 do not feel that I'm warranted in just wading  
25 into their circumstance and telling them, yeah,  
26 they're going to get it. Now, I choose not to  
27 do that, absent some showing of great need and  
28 necessity.

29 Now, if you feel aggrieved at that



1 position, you certainly may ask the Supreme  
2 Court if they will order that, but I don't  
3 intend to do that unless you --

4 MR. SWARTZFAGER: Yes, sir.

5 THE COURT: I'm not saying you can't  
6 convince me, but I don't know of any  
7 circumstance that would require it.

8 *So and other relief.*

9 MR. SWARTZFAGER: Again, I think the Court  
10 has thoroughly covered it in the relief that we  
11 have sought. And again, I think -- I believe  
12 we've-- that covers everything we've asked in  
13 motion. We've been over everything. There is  
14 no further relief we're seeking from this  
15 motion.

16 THE COURT: Mr. White, do you have  
17 anything?

18 MR. WHITE: Other than our position, of  
19 course, is that the Court no longer has  
20 jurisdiction over this case because the  
21 post-conviction petition has been filed and our  
22 response has been filed. And, you know, all  
23 that's left is to file a reply.

24 THE COURT: Well, I think you're absolutely  
25 right, though the Supreme Court not only  
26 permits, but spurns out these little  
27 circumstances like this, including bonds and  
28 some other matters. I would like to -- you  
29 know, I don't intend to exercise my jurisdiction

1 further than I am directed by them. And so as  
2 far as I'm concerned, I just -- one reason that  
3 I wanted to bring this thing on out is to kind  
4 of be sure that I've done all I needed to do.

5 You got a record of everything that needs  
6 to be handled and -- but I'm not impeding  
7 whatever process is going on in the Supreme  
8 Court, which ultimately is going on.

9 MR. SWARTZFAGER: Yes, sir. And to bring  
10 to the Court's attention, there is another  
11 motion that's set on the docket regarding the  
12 authority to depose Mr. Daniels. And I think  
13 that goes along with the Court's jurisdiction  
14 and so forth.

15 There was an order signed on -- I didn't  
16 bring a copy of the order with me setting it,  
17 but we do have that motion to present that we  
18 feel like that we're entitled to depose  
19 Mr. Daniels under Rule 22.

20 And the reason being is Mr. Daniels gave an  
21 affidavit way back when saying -- when he  
22 became -- when he became employed with the  
23 district attorney's office that he would not  
24 discuss the matter with anyone. He refused to  
25 discuss the matter in private with us. And  
26 then, lo and behold, when the State files their  
27 reply, their response, there is an affidavit  
28 from Mr. Daniels in there talking about the  
29 merits of the case, after Mr. Daniels had stated

1 under oath he would not discuss the case with  
2 anybody. Clearly he did.

3 The affidavit contradicts the affidavit of  
4 his co-counsel that we supplied with the  
5 petition. The affidavit contradicts affidavits  
6 of the family members as to what was discussed  
7 during their meetings. And we're entitled to be  
8 able -- this classic reply, that we're entitled  
9 to reply to the State's case.

10 You know, it would have been, you know, let  
11 a sleeping dog lie, but then the State brought  
12 it up by filing his affidavit with their  
13 response. And now we're entitled to see when he  
14 began talking to the State, what he discussed  
15 with the State, as well as what he discussed  
16 with family members and co-counsel.

17 And we believe the Court does have  
18 jurisdiction, and we've attached a couple of  
19 Supreme Court orders in *Jordan versus State* and  
20 two from -- both of Willie Manning's cases where  
21 the Supreme Court, after a petition was filed --  
22 and we sought to depose him. We filed this  
23 motion before the petition was filed, then we  
24 filed a supplement to it.

25 And in *Jordan* and in both Mannings, that  
26 was similar to -- it was not a motion to depose,  
27 but it was other motions pending. And the  
28 Supreme Court remanded it to the circuit court  
29 for the Court to rule on. So we believe that

1 the Court does have jurisdiction since we filed  
2 them before the petition was filed in order to  
3 rule on this outstanding motion.

4 THE COURT: Well, I would assume we can get  
5 the Supreme Court to tell me to or not to, and  
6 that would be preferable, simply because I'm not  
7 anxious to expand my jurisdiction. My thought  
8 is, it would be a simple matter to get them to  
9 tell me to do it, and I'll be happy to do it.

10 MR. WHITE: Your Honor, we think they have  
11 already ruled on it. On December the 8<sup>th</sup>, the  
12 day they filed their petition, they filed a  
13 motion for leave to proceed in the trial court  
14 with a petition for post-conviction relief;  
15 motion to stay proceedings and supplement and  
16 amend petition; notice of pending motion in the  
17 trial court.

18 And they go through, and what they're  
19 talking about is the motions to depose, the ex  
20 parte motion at that time. And, of course, as  
21 we said, there is no such thing as an ex parte  
22 deposition.

23 Anyway, on the 17<sup>th</sup> of March, the  
24 Mississippi Supreme Court entered an order that  
25 says, *This matter came before the undersigned*  
26 *justice on the motion to stay proceedings and*  
27 *supplement and amend petition that was filed by*  
28 *petitioner and styled as the motion for leave to*  
29 *proceed in the trial court with a petition for*

1        *post-conviction relief; motion to stay*  
2        *proceedings and supplement and amend petition;*  
3        *notice of pending motion in the trial court.*  
4        *After due consideration, this justice finds that*  
5        *the motion should be denied.*

6                *And then they -- the motion to stay*  
7        *proceedings and supplement and amend petition is*  
8        *hereby denied.*

9                *Then they filed a motion to reply, and the*  
10        *Supreme Court on the 23<sup>rd</sup> of March said, This*  
11        *matter came before the undersigned justice on*  
12        *motion for leave to file a reply that was filed*  
13        *by Loden. This justice finds the motion to stay*  
14        *has been denied, and this motion should be*  
15        *dismissed as moot.*

16                *Therefore, the motion for leave to file a*  
17        *reply is dismissed as moot.*

18                *You know, the relief they're asking, which*  
19        *we contend they have to ask the Supreme Court*  
20        *for, they cite **Jordan** and **Manning**. I was there.*  
21        *The trial court said, No, I don't have*  
22        *jurisdiction. They went to the Mississippi*  
23        *Supreme Court. The Mississippi Supreme Court*  
24        *said you had -- did not say you had jurisdiction*  
25        *all the time. They remanded it. And you don't*  
26        *remand for a case that the Court already has*  
27        *jurisdiction of. They remanded it for further*  
28        *proceedings in both of those cases.*

29                *And, of course, in both of those cases,*

1           that was before the State had filed its  
2           response. The State has filed its response in  
3           this case already, filed it on the 16<sup>th</sup>, was  
4           it, of March. Maybe the -- and so we assert  
5           that the Court has no jurisdiction.

6           If they want to try to go to the Court --  
7           the Supreme Court again, they are free to do so,  
8           but I think at this point the Court has already  
9           said, *We're not going to do it*. So we consider  
10          that the Court is without jurisdiction, and this  
11          motion should be dismissed as without  
12          jurisdiction..

13          THE COURT: While it may be an easy matter  
14          to get them to do that, Counsel, I do not  
15          presume that's what they would ask me or tell me  
16          to do. Approach them with the proposition. If  
17          they say yes, I'll be pleased to do it.

18          MR. SWARTZFAGER: Yes, sir.

19          THE COURT: All right. Now, anything  
20          further?

21          MR. SWARTZFAGER: Not from us, Your Honor.  
22          Not from Mr. Loden.

23          THE COURT: I'm going to ask the court  
24          reporter to transcribe and certify this and to  
25          provide an original to the Supreme Court.

26          MR. SWARTZFAGER: Yes, sir.

27          THE COURT: Unless you want to do that.

28          MR. SWARTZFAGER: The Court -- that's  
29          perfectly acceptable with us, Your Honor.

1           THE COURT: Well, I'm acting as kind of an  
2 extension, adjunct, or whatever or possibly, as  
3 suggested by Mr. White, without any jurisdiction  
4 at all, but I'll give them the benefit of  
5 whatever we have. All right?

6           MR. SWARTZFAGER: Yes, sir. I believe that  
7 will make things easier.

8           THE COURT: All right. Anything further?

9           MR. WHITE: No, Your Honor.

10          THE COURT: Always a pleasure to see you on  
11 Monday.

12                   (END OF PROCEEDING.)  
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COURT REPORTER'S CERTIFICATE

STATE OF MISSISSIPPI

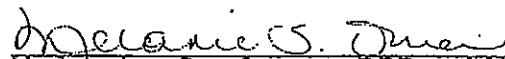
COUNTY OF ITAWAMBA

I, Melanie S. Owen, Official Court Reporter for the First Judicial District of Mississippi, do hereby certify that to the best of my skill and ability, I have reported the proceedings had and done in the Hearing in **STATE OF MISSISSIPPI VERSUS STATE OF MISSISSIPPI**, being Cause No. CV03-090 on the docket of the Circuit Court of the First Judicial District of Itawamba County, Mississippi.

I further certify that this proceeding was stenographically reported by me and later reduced to print through Computer-Aided Transcription, and the foregoing 19 pages contain a full and true transcript of said proceedings, as transcribed by me to the best of my ability.

I do further certify that my certificate annexed hereto applies only to the original and certified transcript. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or direction.

This the 14th day of May, 2009.

  
Melanie S. Owen, RPR, CSR No. 1262  
Official Court Reporter  
First Judicial District of Mississippi  
300 Bass Lane  
Pontotoc, Mississippi 38863  
Telephone: (662)844-7320



# **EXHIBIT 44**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

*Mississippi Supreme Court Case No. 2007-DR-01758-SCT  
Itawamba County Cause No. 03-090(G)1*

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*THOMAS EDWIN LODEN, Petitioner*

*v.*

*STATE OF MISSISSIPPI, Respondent*

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**AFFIDAVIT OF GREGORY L. CHANEY**

District of Columbia

Gregory L. Chaney, first being sworn, testifies to the following under oath:

1. I am over 21 years of age, and otherwise competent to testify.
2. I am an attorney and am admitted to the bar in the state of Illinois. However, I am currently in an inactive status. I am presently Legislative Counsel to United States Senator Jay Rockefeller.
3. From April 1997 to October 2006 I was on active duty as an officer with the United States Marine Corps.
4. In the spring of 2001 I was serving as a Judge Advocate (military attorney) aboard Marine Corps Recruit Depot in San Diego, California.
5. I was detailed as legal counsel for Gunnery Sergeant Thomas E. Loden, Jr. in connection with the proceedings for his administrative separation from the United States Marine Corps.


6. In connection with that assignment, I spoke personally with Mr. David Daniels, whom I understood was defense counsel for Gunnery Sergeant Loden, at Mr. Daniels' office in Tupelo, Mississippi.
7. My meeting with Mr. Daniels lasted between five and fifteen minutes. During the course of that discussion Mr. Daniels did not ask for any of the military records of Gunnery Sergeant Loden.
8. At the conclusion of our discussion, I left Mr. Daniels my card and told him that I would provide any assistance that I could in connection with Gunnery Sergeant Loden's defense. I was never contacted by Mr. Daniels after the meeting noted above.
9. The only discussion which Mr. Daniels and I had concerning Gunnery Sergeant Loden's service in the United States Marine Corps was my indicating to Mr. Daniels that I was surprised to see Gunnery Sergeant Loden charged with this crime because he had had a good record up to that time in the Marine Corps. No specific details of his military record or of his service were discussed with Mr. Daniels.
10. If I had been asked to do so by Mr. Daniels, I could have provided him with Gunnery Sergeant Loden's military records both at the time of my conversation with him in Tupelo, Mississippi and upon later request. However, Mr. Daniels never requested them.
11. I was not contacted by any other member of Gunnery Sergeant Loden's defense team with respect to his military service. If I had been contacted I would have supplied them with Gunnery Sergeant Loden's military records and my

interpretation of those records regarding the quality of his service with the United States Marine Corps.

FURTHERMORE AFFIANT SAYETH NOT

  
\_\_\_\_\_  
GREGORY L. CHANEY

Sworn to and subscribed before me  
this 23<sup>rd</sup> day of June 2009.

  
\_\_\_\_\_  
NOTARY PUBLIC FOR THE  
DISTRICT OF COLUMBIA

**SHEILA A. DOMBO**  
District of Columbia  
My Commission Expires  
May 14, 2011

# **EXHIBIT 45**

IN THE SUPREME COURT OF MISSISSIPPI

*Mississippi Supreme Court Case No. 2007-DR-01758-SCT  
Itawamba County Cause No. 03-090(G)1*

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*THOMAS EDWIN LODEN, Petitioner*

v.

*STATE OF MISSISSIPPI, Respondent*

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**AFFIDAVIT OF ANDRE DE GRUY**

I, Andre de Gruy, after being duly sworn, depose and state as follows:

1. I have been a lawyer licensed to practice law in the State of Mississippi since 1990. I am currently the Director of the Office of Capital Defense Counsel. I have held this position since 2001. I supervise a staff of three attorneys and four investigators. Our office represents indigents in capital cases at the trial and direct appeal stages of litigation.
2. Prior to being appointed as the Director of that Office, I was an assistant Public Defender with the Hinds County Public Defender's Office. I represented indigents charged with major felonies at the trial stage. I also consulted with attorneys around the State who were handling capital cases. Before working with the Public Defender, I was director of the Mississippi Capital Defense Resource Center. My practice was devoted exclusively to handling capital cases at the trial, direct appeal, and post-conviction stages of litigation.
3. I regularly speak on subjects pertaining to capital litigation at CLE conferences and have conferred and/or trained lawyers in over one hundred capital cases in Mississippi.
4. In 2001, I learned that Thomas Loden had been sentenced to death after he pled guilty. Pursuant to Miss. Code Ann. § 99-19-105, he was entitled to a mandatory appellate review of his death sentence and an appeal of the proceedings leading to his death sentence, and I was appointed to represent him on that direct appeal. Ordinarily, when I represent a client on direct appeal, I raise issues that were raised below. If I did not represent the client at trial, I also raise post-conviction issues pursuant to Rule 22(b) of the Mississippi Rules of Appellate Procedure.
5. I had not represented Mr. Loden in the Circuit Court, and thus I had an obligation to raise post-conviction issues. At the time, an older version of Rule 22(b) was in effect. Currently, the only type of post-conviction claim that can be raised on direct appeal is one that is apparent from the trial record. The older version of the Rule, however, was not so limited. Moreover, I represented Mr. Loden before the Court clarified that "post-conviction" claims under Rule 22(b) included only claims of ineffective assistance of

counsel or claims arising under *Atkins v. Virginia*. Not until the Court decided *Branch v. State*, 882 So. 2d 36 (Miss. 2004), *Hodges v. State*, 912 So. 2d 730 (Miss. 2005), and *Havard v. State*, 928 So. 2d 771 (Miss. 2006), did it clear up what was expected of appellate counsel who had to raise post-conviction claims. Because the law was uncertain at the time, I was not sure what types of issues I had to raise on Mr. Loden's behalf.

6. Mr. Loden's case was also complicated because he pled guilty. At the time, I was not sure if the time to file a post-conviction challenge began to run when he pled guilty. The statute setting the statute of limitations provided that in cases of guilty pleas, the time to file a post-conviction challenge began to run from the time of conviction. However, the legislature had recently modified the post-conviction statute, and the Court amended Rule 22, M.R.A.P. to cover capital cases. Under Rule 22(c), indigent death-sentenced inmates had the right to have post-conviction counsel appointed following the conclusion of direct appeal, but the Rule had no provision for a capital case with a guilty plea.
7. It was unclear whether Mr. Loden's case would be governed by the statute or the rule. Furthermore, since the Court did not appoint qualified post-conviction counsel to challenge the guilty plea, I thought that I may have to take some steps at least to preserve Mr. Loden's right to challenge his guilty plea. There was no precedent to follow, and I thought it odd that someone who pled guilty would not receive the same benefit of qualified counsel that other death-sentenced inmates received.
8. Because of the uncertainty at the time I began representing Mr. Loden, I did not know whether my obligation under Rule 22(b) included challenges to the guilty plea. Furthermore, I was not certain what types of post-conviction claims I had to raise or whether I had to raise them with the trial judge or with the Supreme Court, as required under Rule 22(c). Ultimately, I filed a petition for post-conviction relief in the Circuit Court and raised a challenge to the erroneous advice that trial counsel gave to Mr. Loden. I believed that any other claim that involved Mr. Loden's mental state or social history would probably have to be raised in a post-conviction petition challenging the sentence and did not consider raising that in connection with a challenge to the guilty plea.
9. In the post-conviction challenge to Mr. Loden's guilty plea, I learned that Mr. Loden had been interested in appealing certain suppression issues. He learned from his lawyers that he would have a right to an appeal. I obtained an affidavit from James Johnstone, one of Mr. Loden's lawyers, and I also relied on correspondence that Mr. Loden wrote before and after his guilty plea regarding his right to an appeal. I wanted to discuss this matter with David Daniels, Mr. Loden's other attorney, but Mr. Daniels, who had gone to work for the District Attorney, did not cooperate. I filed a motion to recuse the District Attorney's office from the case and to bar Mr. Daniels from assisting the District Attorney. In response, Mr. Daniels submitted an affidavit in which he swore that he would not discuss the case with anyone. Ultimately, the Circuit Court did not find Mr. Loden credible, and the Mississippi Supreme Court affirmed its decision. *Loden v. State*,

971 So. 2d 548 (Miss. 2007).

10. Recently, I learned that Mr. Daniels provided an affidavit on behalf of the State to rebut allegations of his ineffectiveness in preparing for the mitigation phase of Mr. Loden's case. In that affidavit, Mr. Daniels also acknowledged that Mr. Loden asked about his right to an appeal and that he told Mr. Loden that he, Daniels, would not do the appeal but the "Mississippi Supreme Court would automatically review a sentence of death. I told him that we could not guarantee him exactly what the Court might do, or not do upon such review."
11. Mr. Daniels' affidavit would have corroborated the evidence that we presented to the Circuit Court. Unfortunately, it was unavailable to Mr. Loden at the time of the evidentiary hearing. Because the statement comes from someone who now works for the prosecutor and who has been unwilling to assist Mr. Loden, I feel that it would have been important for the Circuit Court to have learned of Mr. Daniels' admission that he had advised Mr. Loden about his right to an appeal.

  
\_\_\_\_\_  
ANDRE DE GRUY

Sworn to and subscribed before me  
this the 11<sup>th</sup> day of June 2009.

  
\_\_\_\_\_  
NOTARY PUBLIC

*My commission expires 11/14/2009.*



# **EXHIBIT 46**

IN THE CIRCUIT COURT OF ITAWAMBA COUNTY, MISSISSIPPI

THOMAS EDWIN LODEN, )

)

Petitioner, )

)

VS. )

NO. 2007-DR-01758-SCT

)

03-090 (G) 1

)

STATE OF MISSISSIPPI, )

)

Respondent. )

DEPOSITION

OF

DAVID DANIELS

JULY 9, 2009

ALPHA REPORTING CORPORATION

Heather L. Deloach

236 Adams Avenue

Memphis, Tennessee 38103

(901) 523-8974

1                   The deposition of DAVID DANIELS is  
2 taken on, this, the 9th day of July, 2009, on behalf of  
3 the Petitioner, pursuant to notice and consent of  
4 counsel, beginning at approximately 9:57 in the offices  
5 of Alpha Reporting in Tupelo, Mississippi.

6                   This deposition is taken pursuant to  
7 the terms and provisions of the Mississippi Rules of  
8 Civil Procedure.

9                   All forms and formalities, excluding  
10 the signature of the witness, are waived, and objections  
11 alone as to matters of competency, irrelevancy and  
12 immateriality of the testimony are reserved to be  
13 presented and disposed of at or before the hearing.

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## I N D E X

## DEPONENT:

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By Mr. McDonald

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1           Q       You have no documents responsive to that  
2 subpoena?

3           A       To this subpoena?

4           Q       Yeah.

5           A       Not other than the one I just showed you.

6           Q       Okay. One of the things it asked for was  
7 all documents that concern your applications to or  
8 communications with the district attorney's office  
9 concerning how you came to be employed by them. You  
10 don't have any documents about that application?

11          A       I do not.

12          Q       When did you start with the attorney  
13 general -- sorry -- when did you start with the district  
14 attorney's office?

15          A       I believe it was, to the best of my  
16 recollection, it was July 1 or 2, 2002.

17          Q       And that was when you actually walked in the  
18 door and started working there?

19          A       Yes.

20          Q       And did you have to go through some sort of  
21 background check before you actually started work?

22          A       No, I don't think so. No formal -- no  
23 formal one.

24          Q       When do you believe you were first con --

1 Q And so you had the extra capacity to take on  
2 a capital case at that point?

3 A Yes.

4 Q Okay. So do you remember anything about  
5 this meeting with Mr. Johnstone on January 9?

6 A I remember going to his office. I believe  
7 it's on that date, and we talked. I believe  
8 Mr. Johnstone was preparing copies or was having copies  
9 prepared of certain things, certain discovery that he  
10 had and we were -- he was just filling me in on the  
11 facts of the case, and there were a lot of facts. We  
12 talked at length. I think I got some copies of some  
13 things. And I came back, I believe, I came back to  
14 Tupelo and he may have -- it was either that day or the  
15 next day, I think, he may have come back over to Tupelo  
16 and brought some more stuff that I didn't get.

17 Q On that first day?

18 A Yeah.

19 Q Now, you've turned over your files on the  
20 Loden case to post-conviction office; is that right?

21 A I don't think I did.

22 Q What did you do with your files on the Loden  
23 case?

24 A I destroyed my file last year.



1 Q The originals?

2 A I destroyed everything I had.

3 Q The originals?

4 A The original what? Everything I had was  
5 copies.

6 Q When did you do that?

7 A I believe it was in October of last year.

8 Q Of 2008?

9 A If I turned over anything -- whatever --  
10 whatever I had left, I had in a box in a gated storage  
11 room. And I never was easy about it, so after seven  
12 years, I just determined the best way to protect that  
13 would be to destroy it.

14 Q That's October of 2008?

15 A Yeah.

16 Q What do you mean, you weren't easy about the  
17 fact that you had --

18 A Well, I mean, if somebody had broken into my  
19 storage room and gotten that file, I feel like I would  
20 probably have been liable. At any rate a lot of private  
21 and confidential information would fall into the hands  
22 of somebody else.

23 Q About the Loden case?

24 A Yes.

1           Q       Did you consult with anybody before you  
2 destroyed that box?

3           A       No.

4           Q       Did it dawn on you that given Mr. Loden was  
5 still involved in post-conviction proceedings that  
6 perhaps that that evidence -- that document -- that box  
7 might contain relevant evidence?

8           A       Well, it had been seven years, as I said,  
9 and I'd been hanging on to it.

10          Q       What was in the box as best you can  
11 recall?

12          A       I just -- no, I can't tell you. It was  
13 whatever I had on Mr. Loden's case.

14          Q       Well, did you turn over any files related to  
15 the case?

16          A       I can't remember. I don't think I did.

17          Q       Can you unhook yourself for a second and  
18 take a look? I've got a couple of boxes over here.  
19 There's a box that says Loden 2 of 5 and right next to  
20 it is a box that says Loden 3 of 5 and see if those look  
21 like those might be files from your office.

22          A       Did you say 3 and 5?

23          Q       The two -- I put them in here in the front.  
24 This box and that box. Now, some of those may be copies

1     that we've made, but do those look like things that came  
2     from you?

3             A       I see some of my handwritten notes in this  
4     folder here. I don't recognize any of these folders as  
5     being mine, but I do see some of my work here.

6             Q       In either one of those two boxes I pointed  
7     out to you, do you see anything that you believe did not  
8     come from you or your files?

9             A       It would be impossible for me to say because  
10    I copied Jim Johnstone on a lot of the things that I  
11    did, and I'm sure Jim copied me. So I mean, there would  
12    have been a good bit of duplication, I think, between  
13    his file and mine. But certainly some of my handwritten  
14    notes are in there --

15            Q       Okay.

16            A       -- so -- can you hear me?

17                    VIDEO SPECIALIST: Yes, sir.

18            Q       Did you ask -- I know the answer to this  
19    question, but you didn't ask either Loden or his current  
20    counsel, namely, me, whether you were -- whether we  
21    wanted the files that you destroyed last year,  
22    correct?

23            A       No.

24            Q       When you and Mr. Johnstone met on January 9,

1 motion to hire the investigator. And the table of  
2 contents of the reporter's transcript shows that the  
3 hearing on that motion was on April 25, 2001. If you'll  
4 look at the table of contents, it shows the hearing on  
5 April 25, 2001, starts on page 34 of the transcript, and  
6 the argument concerning mitigation starts on page 63 of  
7 that transcript. You want to just look at that and see  
8 if, in fact, that is the argument on the motion for a  
9 mitigation investigator to be appointed?

10 A (Witness complies).

11 Q And you see that it was Mr. Johnstone that  
12 argued that motion?

13 A Yes.

14 Q Okay. Does that help you remember that the  
15 argument didn't occur until March -- April 25 of 2001?

16 A Well, it just tells me that Mr. Johnstone is  
17 talking to the Court. I don't know what date it  
18 occurred, but I don't even remember specifically  
19 Mr. Johnstone making that argument.

20 Q Okay. Well, I mean, do you agree with me  
21 that you're still looking to get a mitigation  
22 investigator appointed as of March 7? You didn't ask  
23 Herb Wells to do the same investigation, that you were  
24 hoping to get the money to have Mr. Mooers do the

1 investigation?

2 A Well, you know, it's my understanding that a  
3 duty -- that lawyer has a duty to investigate the facts  
4 of any case, and in a capital murder case, that means  
5 evidence for the guilt phase trial and evidence in the  
6 sentencing trial. Although, there is a formal  
7 distinction in the two.

8 I'm always looking in a capital murder case  
9 at mitigation evidence, and so Herb Wells would have  
10 been working toward that end. He would have been  
11 looking for anything for us to use at -- to gain any  
12 sort of a -- an advantage in the case, and he would have  
13 been looking for witnesses to use in our change of  
14 venue. He is a professional retired police detective  
15 from Miami, Florida, and I had every faith that he knew  
16 what he was doing and he knew what we wanted.

17 Q My question to you, it's your deposition, so  
18 I want to know your answer. Did you tell Mr. Wells in  
19 March of 2001 that you wanted him to conduct a  
20 mitigation investigation?

21 A I didn't make a distinction between a  
22 mitigation investigation and. Investigation it was  
23 inclusive --

24 Q You just told --

1           A       -- in my mind.

2           Q       Okay. In your mind, but you didn't tell  
3 Mr. Wells that?

4           A       I'm not sure what I told Mr. Wells eight  
5 years ago.

6           Q       Did you just tell him you wanted him to  
7 investigate the case?

8           A       I told you. I don't recall exactly what I  
9 told him.

10          Q       Did you tell him any witnesses you wanted  
11 him to interview?

12          A       I'm sure I did, and I'm sure I asked him to  
13 find any witnesses that might have any information.

14          Q       Did you give any more direction than just  
15 that?

16          A       And I'm not sure -- I'm not sure, you know,  
17 how we learned of Mr. Loden's sexual abuse in the past  
18 but that -- I considered that to be mitigation. I spoke  
19 with his sister. I spoke with his mother. I spoke with  
20 his aunt. I spoke with his grandmother, and I went out  
21 with Mr. Wells. We located witnesses who would say they  
22 didn't believe Mr. Loden would get a fair trial in  
23 Itawamba County, which was no small task. We were  
24 successful in getting venue changed.

1 theory of the case or it was going to have to be kind of  
2 a heat of passion and mentally out of control defense.

3 Q You say -- you say Loden didn't want to talk  
4 with you about the case?

5 A He didn't -- he didn't want to talk about  
6 the facts of the rape, the murder or any of that, no.

7 Q Did he ask you to look for witnesses?

8 A No, I don't think so.

9 Q Did he ask you to contact any witnesses?

10 A I don't recall.

11 Q Do you remember him telling you that on the  
12 night of the crime his wife had called him on the cell  
13 phone shortly before he met Ms. Gray?

14 A I don't believe he told me that.

15 Q Did you ever hear it?

16 A I don't recall if I did or not.

17 Q Did he ever tell you he tried to contact Jim  
18 Craig?

19 A No.

20 Q Do you know who Jim Craig is?

21 A Yes.

22 Q Do you know now that Craig has submitted an  
23 affidavit corroborating that he spoke to Loden's wife  
24 shortly before the crime and she had essentially taunted

1 Loden by saying she was going to sleep with Craig?

2 A I didn't know that until this morning.

3 Mr. White told me that.

4 Q Do you feel like that was something perhaps  
5 if you'd done further investigation you might have  
6 uncovered on my own?

7 A I don't know. I'd have to go back to that  
8 time and have that information and then go from there in  
9 retrospect. At this point I don't -- that's -- that's  
10 not what he told Bethay.

11 Q What about what he told you?

12 A He didn't tell me.

13 Q He didn't tell you that he had spoken with  
14 Mrs. Loden, his wife, that night?

15 A He may have told me he spoke with her, but I  
16 mean, other than that, I don't know if I would have  
17 known anything --

18 Q Well, did you ask him --

19 A -- there that would.

20 Q Go ahead.

21 A -- that would create a defense.

22 Q Did you ask him if he spoke to her that  
23 night and what they spoke about?

24 A I don't recall. I don't think -- I don't



1 recall him telling me at all about his wife --

2 Q The question was --

3 A -- except that -- about divorce and this  
4 sort of thing.

5 Q The question was, did you ask Mr. Loden what  
6 he spoke with his wife about that night?

7 A I don't recall.

8 Q Now, Mr. White is not your attorney,  
9 right?

10 A Right.

11 Q Was there anything else that you and he  
12 discussed this morning before the deposition other than  
13 that there's an affidavit from Jim Craig admitting that  
14 he and Mrs. Loden had spoken on the night of the crime  
15 about them having sexual relations?

16 A No.

17 Q That was it, only thing that you and  
18 Mr. White talked about?

19 A He said that he was having some documents  
20 faxed up here, and he was trying to get that done. I  
21 believe he got it done. I don't know what the documents  
22 are. He said in his opinion this was about -- about the  
23 sentencing of Eddie Loden would be the subject matter of  
24 the deposition, in his opinion, and that's pretty much

1 it.

2 Q What's your understanding of who it was that  
3 sexually abused Loden when he was a child?

4 A I believe she told me -- I thought she had  
5 told me it was an uncle or a -- someone, maybe a family  
6 member or a friend of a family member, when he was a  
7 small child. And that was different from what I gleaned  
8 from Dr. O'Brien's report, that it was a preacher of some  
9 kind.

10 Q Okay. So when you say she, are you  
11 referring to the sister now?

12 A Yeah, I think the sister and/or the aunt,  
13 Ms. Renick.

14 Q So what investigation did you do about the  
15 identity of this uncle?

16 A I don't believe she could give me a name.

17 Q What investigation did you do? You asked  
18 her for the name?

19 A Yeah. I asked her all about it. She gave  
20 me what she had, and I didn't have any specifics  
21 about -- about exactly where it occurred or who it was.  
22 She couldn't -- she didn't know a name to give me.

23 Q I take it you didn't contact any of Loden's  
24 uncles, true?

1           A       I think there was some discussion about who  
2 his uncles were or something to that effect but --

3           Q       The question was, did you contact any --

4           A       Did not.

5           Q       Do you think personally there would be any  
6 adverse consequences to you if it were ultimately  
7 determined that Loden did not get effective  
8 representation back at trial?

9           A       Well, I don't know because I've never been  
10 held ineffective before.

11          Q       I take it you -- you believe you were not  
12 ineffective, and you are clearly hostile to Loden's  
13 claims in this case, right?

14          A       I'm not so much hostile to Loden's claims.  
15 I understand that this sort of thing is going to come at  
16 you when you represent criminal defendants in important  
17 cases like this. The next thing is going to happen is  
18 the lawyer that represented him is going to be claimed  
19 to be ineffective. So I'm not hostile toward Mr. Loden.  
20 I do feel like I have every right to defend myself.

21          Q       And that's why you submitted the affidavit  
22 on January 23, 2009, right?

23          A       That's right.

24          Q       Let me show you Exhibit 9. Do you recognize

1 write down every phone call. You'll notice I didn't  
2 write down any phone calls.

3 Q If Major Chaney swore that the only time he  
4 had contact with you was when he came to your office  
5 because he wanted to talk to you, you wouldn't disagree  
6 with that, would you?

7 A No. That was the only contact we had.

8 Q And if he swore that the meeting that took  
9 place was no more than 15 minutes, you wouldn't disagree  
10 with that, would you?

11 A It wasn't very long.

12 Q And during that meeting you didn't ask Major  
13 Chaney for any military records of Mr. Loden --

14 A I'm not sure if I did or not.

15 Q You don't remember doing so?

16 A I don't.

17 Q You didn't ask Major Chaney if he was  
18 willing to be a mitigation expert -- a mitigation  
19 witness for Mr. Loden?

20 A No.

21 Q You didn't talk to him about the possibility  
22 of him testifying?

23 A I think I may have talked to him about the  
24 possibility of him testifying, yes.

1 Q You do?

2 A I think I did.

3 Q If he swore that you didn't, would you  
4 disagree with that?

5 A I cannot swear that I asked him if he would  
6 be a witness, but I think that I did tell him that we  
7 might need him as a witness.

8 Q Did Major Chaney tell you that he personally  
9 didn't know Loden? That he was just an attorney who had  
10 been appointed by the marine corps to represent him?

11 A I don't recall that sort of specific  
12 conversation.

13 Q Did you ask Major Chaney if you knew of any  
14 people who did serve with Loden and who knew Loden  
15 personally who might be witnesses?

16 A I don't believe I did.

17 Q So you think it's possible that you spoke to  
18 him about him being a witness for you?

19 A I think it's possible.

20 Q Do you know where Mr. Chaney -- Major Chaney  
21 was located?

22 A I do not know.

23 Q He wasn't in Mississippi, was he?

24 A No, he was not.

1 Q So he was outside of the subpoena power?

2 A He was.

3 Q And what exactly did you think Major Chaney  
4 might testify to, given that he didn't know Mr. Loden?

5 A Well, I don't know. I would assume he had  
6 -- since he was appointed to represent Mr. Loden or he  
7 was serving in some capacity involving Mr. Loden and/or  
8 his discharge from the Marines, I would assume that he  
9 had access to Mr. Loden's records. And I did acquire  
10 some military records. I just can't remember where I  
11 got them from.

12 Q Do you think that perhaps you have sort of  
13 overstated your -- the extent to which your contact with  
14 Major Chaney was part of a mitigation investigation in  
15 this affidavit?

16 MR. WHITE: Objection.

17 A No.

18 MR. WHITE: Asked and answered.

19 A No, I don't. I don't recall a great deal  
20 about it other than I had contact information for him.  
21 I met with him. He did, in fact, initialize the  
22 contact.

23 Q Okay.

24 A And that's all I remember.

1           Q       And in paragraph 5 of your affidavit you  
2   say, it was my opinion that evidence of Mr. Loden's  
3   traumatic early childhood and his good military  
4   background would not have been insubstantial if offered  
5   in mitigation. Do you see that?

6           A       Yes.

7           Q       Other than what you've testified to about  
8   somebody saying that he had been sexually abused as a  
9   child, were you referring to anything else there when  
10   you talk about his traumatic early childhood?

11          A       No, I was not referring to anything else.

12          Q       Do you know who Loden was raised by?

13          A       I believe that he -- I think after his  
14   parents divorced or separated, I think he lived with his  
15   father for a while. And then after these incidents  
16   according to his, I think, his mother and his aunt,  
17   that's what caused him to come and live with his  
18   grandparents in Itawamba County. And after that time,  
19   he did very well.

20          Q       Okay. Do you know if there was any evidence  
21   of Loden being abused by his stepmother?

22          A       I'm not sure there was any evidence of that  
23   unless Dr. O'Brien -- unless he related it to  
24   Dr. O'Brien. He might have.

1           A       I'm not sure I made a -- the specific facts  
2 of everything I talked to her about made known to  
3 Mr. Johnstone.

4           Q       Okay. So today it's your testimony that  
5 this evidence, which you refer to at the sentencing  
6 hearing about Loden being an exemplary student, came  
7 from Stella Renick, right?

8           A       I was just referring to my billing records  
9 about when I had a conference with Rena Loden and  
10 surveyed the house and the surrounding land and  
11 attempted to interview the two housekeepers. I believe  
12 that is the time, or either on the 19th when I spoke to  
13 the housekeeper, at one of those meetings I met Stella  
14 Renick. I believe that was her name, and I believe she  
15 was an aunt, and I believe she related that information  
16 to me.

17          Q       Okay. So did you talk to her about possibly  
18 providing testimony at sentencing about his exemplary --

19          A       No. I don't think I talked to her about  
20 coming in to testify. I was just prepared to subpoena  
21 her again if I needed her.

22          Q       Okay.

23          A       I also spoke with the grandmother, I  
24 believe. Yes, Ms. Rena Loden.



1 Q Okay. What exactly do you remember the aunt  
2 telling you about Loden being an exemplary student?

3 A I just think that that's what she -- excuse  
4 me -- what she told me. That's about it.

5 Q So did you follow up on that? Did you  
6 subpoena any records of that?

7 A I don't recall if I did or not.

8 Q Did you talk to any teachers?

9 A No.

10 Q Did you talk to any coaches?

11 A No.

12 Q Classmates?

13 A No, huh-uh.

14 Q Okay. The next thing you referenced on  
15 that -- at the sentencing hearing is that he entered the  
16 marine corps, that he served with distinction for 18  
17 years, that he attained the rank of E-7, that he was  
18 highly decorated and a combat veteran in Desert Storm.  
19 Who would have offered that testimony if you proceeded  
20 to trial or sentencing hearing?

21 A Loden himself, his family members and, I  
22 believe, I could have called on the officer that  
23 represented him to come and testify.

24 Q Major Chaney?

1           A       Yes.

2           Q       So what personal knowledge did any of his  
3   family members have about the fact that he had attained  
4   the rank of E-7, had served with distinction for 18  
5   years?

6           A       I'm not sure where I gain that information.  
7   I simply -- I had that information, obviously. I  
8   couldn't have recited it. I got it from witnesses  
9   and/or documents that I gathered. And since Loden  
10   wouldn't allow us to put on any evidence in mitigation,  
11   I was hoping to impress the Judge with -- with some of  
12   the good things Loden had done and some of the bad  
13   things that may have prompted him doing what he did. So  
14   that's what that's all about, and I can't tell you  
15   specifically where I got each one of those pieces of  
16   information.

17          Q       Okay. My question, though, was different.  
18   Who did you anticipate calling to testify to those --  
19   that piece of information?

20          A       I was not anticipating calling any  
21   witnesses.

22          Q       Well, who would you have called?

23          A       Well, you're asking me to speculate now.

24          Q       Oh, really. You're -- you're the lawyer.

1           A       Well --

2           Q       You were going to have to call witnesses to  
3 put this evidence on, right?

4           A       Yes.

5           Q       So who would you have called to testify to  
6 that?

7           A       I would have called his mother, his sister,  
8 his aunt. And I had some military records from  
9 somewhere. I would have attempted to enter those into  
10 evidence.

11          Q       How would have gotten those --

12          A       Eddie Loden, as I said, would have been the  
13 best witness of all.

14          Q       Have you ever put on a mitigation case in  
15 any death sentence case before?

16          A       No, I don't believe I did. I know  
17 Mr. Johnstone had, but I don't believe I ever had.

18          Q       Did you ever talk to Mr. Johnstone that your  
19 strategy in a mitigation case would have been to put  
20 Mr. Loden on himself as the primary witness?

21          A       No. He would have been found guilty by that  
22 time, and I don't think that he could have done anything  
23 but help himself.

24          Q       Did you talk to Mr. Johnstone about that

1 any trouble talking about his childhood, did he?

2 A Yes.

3 Q He did, Even about his childhood?

4 A Yes.

5 Q And he had trouble talking about his  
6 military experience?

7 A He didn't talk very much about it. He -- he  
8 related some of it to me, you know. That he had had a  
9 good friend killed there and that he was -- you know, he  
10 had some problems with it. I said, well, you know,  
11 let's -- let's talk about that. Let's see if we can  
12 document some of this. Some of what you've gone through  
13 as a result of that. And he said he didn't seek any  
14 counseling, and he never told anybody he had any  
15 problems with it because it would hurt his military  
16 career. So he said there aren't any records of my -- of  
17 my seeking psychological help or anything as the result  
18 of his Gulf War experiences. So I mean, I took him at  
19 his word.

20 Q And you concluded there was no more  
21 investigation to be done about his Gulf War experiences  
22 because he hadn't reported to the marine corps that he  
23 was having psychological problems; is that right?

24 A Well --

1 Q Is that right?

2 A I concluded that there was no evidence to  
3 substantiate his claims. So, thereby, again, making  
4 Eddie Loden the best witness about all of that.

5 Q You said that he told you that he had seen a  
6 friend killed?

7 A I believe that's what he said.

8 Q Did you -- did you tell Dr. O'Brien about  
9 that instance?

10 A I don't know what I -- what I told  
11 Dr. O'Brien, and I don't know what I provided to  
12 Dr. O'Brien. I know I would have provided whatever he  
13 wanted, and I'm sure that Eddie Loden could tell him all  
14 about it.

15 Q What evidence did you have that Loden was  
16 highly decorated?

17 A I'm not sure.

18 Q And what evidence did you have --

19 A I may have asked him what declarations he  
20 had -- he had acquired or I may have gleaned it from the  
21 documents I had.

22 Q Did you have any witnesses to testify to  
23 that other than Loden?

24 A No. His military officer.

1 those issues. Have you stated in this affidavit the  
2 best of your recollection of those conversations? This  
3 is accurate, correct, your affidavit?

4 A Yes.

5 MR. WHITE: Which -- where are we now?

6 MR. MCDONALD: Paragraph 6 of the affidavit.

7 BY MR. MCDONALD:

8 Q Okay. In paragraph 6 you write, I told him  
9 that we could not guarantee him exactly what the Court  
10 might do or not do upon such review. Do you see that?

11 A Yes.

12 Q Did you do any research in an attempt to try  
13 to figure out what issues could or could not be reviewed  
14 by the Supreme Court if he pleaded guilty?

15 A Well --

16 Q Did you do any research?

17 A Yes, I did.

18 Q You looked at case law?

19 A I looked to the statute for the most part.

20 Q What statute?

21 A And it sets out the -- I can't tell you the  
22 section number, but the section that states that there's  
23 an automatic review of death penalty cases. So, yes, I  
24 looked at the law. And basically knew if Mr. Loden got

1 the death penalty, it was my hope that he wouldn't, but  
2 if he did, there would be a review by the Supreme Court.  
3 Now, Mr. Loden was very precise -- I remember this above  
4 all --

5 Q Do -- okay. Hold on. Let me -- before  
6 you -- let me go back to the -- let me ask the  
7 questions. So you say you looked at the statute; is  
8 that right?

9 A I either looked at it or I'd already looked  
10 at it, yes.

11 Q It was a statute that talked about the  
12 Mississippi Supreme Court's review of death sentence  
13 cases; is that right?

14 A Yes.

15 Q Did you do any legal research specifically  
16 on what, if any, issues would be foreclosed by pleading  
17 guilty?

18 A I don't recall if I did. I don't recall  
19 what the law was.

20 Q Okay. Did you consult with anybody about  
21 that?

22 A No, I didn't.

23 Q Had you done appeals before?

24 A Yes.

1           Q       Had you done any post-conviction work  
2 before?

3           A       No.

4           Q       Okay. Let me keep looking through my notes  
5 here. I may not need as much time as I indicated. Just  
6 a second ago you said you hoped that he wouldn't be  
7 sentenced to death. Did you have any doubt in your mind  
8 that if Loden plead guilty and you all didn't put on any  
9 mitigation evidence that he was going to be sentenced to  
10 death by Gardner?

11          A       Well, I thought that he would, yes.

12          Q       And you had cases with Gardner before,  
13 right?

14          A       Yes.

15          Q       So you knew he was a tough sentencer,  
16 right?

17          A       Well, you know, Gardner sometimes is tough,  
18 sometimes I've seen him just go exactly -- exactly the  
19 opposite way. But in this case I thought he would  
20 impose the death penalty, and I thought that any jury in  
21 Itawamba, Lee or Rankin county would as well. But it  
22 was certainly what -- you know, we were trying to  
23 represent Loden the best we could. I was hopeful to  
24 move the Judge in some way, but I wasn't that



1           Q       But you yourself weren't sure what issues  
2     the Supreme Court would review if he plead guilty,  
3     right? I mean, that's what you swore to in your  
4     statement. Quote, I told him that we couldn't guarantee  
5     him exactly what the Court might do or not do upon such  
6     review, right?

7           A       That's true.

8           Q       You didn't -- and you're not -- you didn't  
9     do post-conviction work, right?

10          A       No.

11          Q       So you personally didn't really know exactly  
12     what issues would or would not be reviewed by the  
13     Supreme Court?

14                 MR. WHITE: Objection. Whether or not  
15     someone does post-conviction work doesn't have nothing  
16     to do with direct appeal.

17          A       I thought that I would be misadvising him  
18     and misinforming him if I tried to tell him what the  
19     Supreme Court would look at or what they would decide  
20     on, regarding any issue.

21          Q       Including the suppression issues?

22          A       Including that.

23          Q       All right.

24          A       I told him that -- that those issues would

# **EXHIBIT 47**

1 IN THE CIRCUIT COURT OF ITAWAMBA COUNTY, MISSISSIPPI

2  
3  
4 THOMAS EDWIN LODEN, )

5 )

6 Petitioner, )

7 )

8 VS. ) NO. 2007-DR-01758-SCT

9 ) 03-090 (G) 1

10 )

11 STATE OF MISSISSIPPI, )

12 )

13 Respondent. )

14  
15 DEPOSITION

16 OF

17 JIM JOHNSTONE

18 JULY 9, 2009

19  
20 ALPHA REPORTING CORPORATION

21 Heather L. Deloach

22 236 Adams Avenue

23 Memphis, Tennessee 38103

24 (901) 523-8974

1                   The deposition of JIM JOHNSTONE is  
2 taken on, this, the 9th day of July, 2009, on behalf of  
3 the Petitioner, pursuant to notice and consent of  
4 counsel, beginning at approximately 8:54 in the offices  
5 of Alpha Reporting in Tupelo, Mississippi.

6                   This deposition is taken pursuant to  
7 the terms and provisions of the Mississippi Rules of  
8 Civil Procedure.

9                   All forms and formalities, excluding  
10 the signature of the witness, are waived, and objections  
11 alone as to matters of competency, relevancy and  
12 immateriality of the testimony are reserved to be  
13 presented and disposed of at or before the hearing.

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

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1           A       That's Daniels'. I don't know if you  
2 actually --

3           Q       I think it's Exhibit 2.

4           A       There it is. I'm sorry.

5           Q       That's okay. In paragraph 12 of Exhibit 2,  
6 you said, quote, Loden wanted to know whether, if he  
7 pleaded guilty, he could appeal, and in particular  
8 whether he could appeal from the Circuit Court's adverse  
9 pretrial rulings including the rulings on the  
10 suppression motions. I told Loden that if he pleaded  
11 guilty and was sentenced to death, the Mississippi  
12 Supreme Court would review his sentence, and that they  
13 would review everything that was in the record.

14                   I told Loden that I believed that the  
15 rulings on the suppression motions, the order denying  
16 the request for funds to hire a mitigation specialist,  
17 and the use of Loden's wife Kat to induce Loden to talk  
18 with the police on June 30, 2000, were issues that might  
19 be reviewed that were potentially viable. Did you tell  
20 Loden that?

21           A       I believe the language reviewed that were  
22 potentially viable was language back and forth between  
23 you and I on this -- on this affidavit. And as I  
24 recall, again, I -- I told Loden that I did not know



1 what the Mississippi -- the Supreme Court or any other  
2 court would -- would review in -- in their automatic  
3 review should he get the death penalty.

4 Q Is that something you researched at all?

5 A No. I knew the statute said that it would  
6 be an automatic review, and, therefore, I told him that  
7 rather than say they would review certain things or  
8 would not review certain things, I said, I do not know  
9 what they would review. If these items were -- were  
10 potentially viable is a term that I would say would mean  
11 I don't know whether they would review them or not.

12 That meaning that they might review them or  
13 they might not, but that the direct appeal would not be  
14 available to him if he -- if he plead guilty.  
15 Specifically he would be told that he could not appeal a  
16 guilty -- a guilty plea. That in order to preserve any  
17 of his -- to preserve for sure any of his appealable  
18 grounds, it's like Daniels said, he had to go to trial  
19 and have a jury verdict.

20 Q But you personally didn't even know  
21 whether --

22 A No.

23 Q Hold on. Let me finish.

24 A Oh, I'm sorry.

1           Q       You personally didn't know whether the  
2 Mississippi Supreme Court would review those issues if  
3 he got the death penalty, right?

4           A       I didn't.

5           Q       And so you didn't tell him one way or the  
6 other because you didn't know, true?

7           A       True.

8           Q       Okay. Let me -- let me look over -- oh,  
9 here's a question for you. Do you know Sam Ready?

10          A       I do.

11          Q       Who is he?

12          A       He's an attorney that at one point in time  
13 was assistant DA. Now is in private practice.

14          Q       Do you know when he retired?

15          A       I don't recall.

16          Q       Even the year?

17          A       No. It's been a few years ago.

18          Q       Okay. Loden did not ever discourage you  
19 from doing an investigation, did he?

20          A       Discourage. Well, after he indicated that  
21 he wanted to enter a plea of guilty, he discouraged us  
22 and -- and advised us that he did not want us to cross  
23 examine any witnesses or present any witnesses or proof  
24 in mitigation. I mean, that was a discouragement, I

**ORIGINAL**

## AMENDMENT SHEET

I, the undersigned, James P. Johnson, do hereby certify that I have read the foregoing examination and that to the best of my knowledge said deposition is true and accurate with the exception of the following corrections listed below:

PAGE:	LINE:	CORRECTION:
<u>1</u>	<u>18</u>	<u>July 10<sup>th</sup> 2009</u>

<u>95</u>	<u>20</u>	<u>flesh not Flush</u>
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<u>89</u>	<u>21</u>	<u>continuance</u>
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<u>90</u>	<u>7</u>	<u>continuance</u>
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July 14, 2009  
Date

James P. Johnson  
Signature of Witness

Sworn to and Subscribed before  
me this 14<sup>th</sup> day of July, 2009.

Tracy Taylor  
Notary Public

